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OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

PLAINTIFFS,

v.

STATE OF NEW HAMPSHIRE

DEFENDANT.

ON THE REPORT OF THE SPECIAL MASTER
OF DECEMBER 30, 1992

EXCEPTIONS OF THE STATE OF NEW HAMPSHIRE AND BRIEF IN SUPPORT OF EXCEPTIONS

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EXCEPTIONS OF THE STATE OF NEW HAMPSHIRE

The State of New Hampshire, the Defendant herein, excepts to each of Recommendations A through D in the Special Master's Final Report dated December 30, 1992.

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BRIEF FOR THE STATE OF NEW HAMPSHIRE IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

1. Whether this case remains appropriate for the exercise of the Court's original jurisdiction. (Exception to Recommendation A.)
2. Whether the record establishes that the New Hampshire Tax on Nuclear Station Property statute violates 15 U.S.C. 391 and is therefore invalid under the Supremacy Clause of the United States Constitution (Exception to Recommendation B.)
3. Whether the record establishes that the New Hampshire Tax on Nuclear Station Property statute is invalid under the Commerce Clause of the United States Constitution. (Exception to Recommendation C.)
4. Whether, if the New Hampshire Tax on Nuclear Station Property statute is invalid, a refund of all property taxes paid less the credits taken against the New Hampshire Business Profits Tax is the proper remedy. (Exception to Recommendation D.)

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JURISDICTION

The motion for leave to file a complaint invoking the original jurisdiction of this Court was granted on January 27, 1992. The complaint alleges that this Court has jurisdiction under the Constitution of the United States, Article III, Section 2, Clauses 1 and 2, and 28 U.S.C. 1251(a)(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, section 8, clause 3 of the constitution of the United States provides as follows:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.

Article VI, clause 2 of the Constitution of the United States provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

Article III, section 2, clause 3 of the Constitution of the United States provides as follows:

> In all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction.

The Eleventh Amendment of the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, com-

menced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Title 28 U.S.C. §1251(a) provides:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

Title 15 U.S.C. §391 provides as follows:

Tax on or with respect to generation or transmission of electricity. No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

New Hampshire's "Tax on Nuclear Station Property," Chapter 354 (H.B. 63 § 1) of the 1991 New Hampshire Laws, is set out in full in Exhibit A to the Plaintiff States' Complaint and is codified as New Hampshire Rev. Stat. Ann. 83-D.

New Hampshire's "Business Profits Tax," New Hamp. Rev. Stat. Ann. 77-A:5, prior to amendment by Chapter 354 (H.B. 64 § 2) of 1991 New Hampshire Laws, is contained in the Addendum to the Plaintiff States' Brief in Support of Motion for Leave to File Complaint.

STATEMENT

A. Introduction and Summary

In this case, the Commonwealth of Massachusetts and the States of Rhode Island and Connecticut challenge New Hampshire's Nuclear Station Property Tax statute that was enacted in 1991 after New Hampshire's first nuclear reactor — Seabrook Station — went into service. The Plaintiff States sought leave to file their complaint, contending that the burden of New Hampshire's new tax "will ultimately be borne disproportionately by non-New Hampshire consumers, and thus this tax will provide substantial and direct commercial advantage to local businesses and consumers." Complaint ¶29 A. This Court granted leave to file the Complaint and appointed Vincent L. McKusick to serve as Special Master.

Judge McKusick issued his Final Report on December 30, 1992. The Report notes that the Plaintiff States "contended before this Court that in-state consumers effectively were exempt from the Seabrook Tax while out-of-state consumers bore its brunt." Final Report at 15. But the Report finds that this contention was incorrect because the record shows that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States." Final Report at 16. Nonetheless, Judge McKusick recommends (1) that this Court continue to treat the case as if it involved a controversy between two or more states and (2) declare the Nuclear Station Property Tax statute to be invalid.

The Report concludes that the property tax itself is not violative of the Commerce Clause. Final Report at 26 n.17. Under the property tax, New Hampshire has collected approximately $11.2 million for the last six months of 1991 and about $22.4 million for 1992, or a total of more than $33 million. All of this revenue, according to the Report, could have been collected and retained by New Hampshire *if* it had not made the mistake of

allowing payments of the Nuclear Station Property Tax to be credited against the taxpayer's obligation to pay New Hampshire's business profits tax. The only constitutional or statutory defect the Report identifies is the decision to allow the credit to be taken.

The total credits claimed by all payers of the Nuclear Station Property Tax on tax returns filed to this date aggregate $1,470,620. Stipulation ¶¶ 7.10, 7.15, 7.33 and 7.40. These credits were not claimed by the New Hampshire owners of Seabrook Station because they had no taxable income against which a credit could be applied. The total credits were claimed by four of the interstate utilities that intervened in this case contending that the credit discriminated against them.

Having concluded that New Hampshire's statute should be invalidated, the Report observes that this Court has tended "to allow States the initial chance to correct the offending tax system." Final Report at 42. And, indeed, if the credit constitutes a defect in New Hampshire's system, it could no doubt be eliminated by the New Hampshire legislature, retroactive to the date the tax was imposed. The result would be the collection of $1,470,620 of business profits taxes from the four out-of-state owners who claimed the credit on their 1991 business profits tax returns and, when 1992 returns are filed, collection of whatever business profits taxes are due from Seabrook owners without the allowance of a Nuclear Property Tax credit.

Despite the ease with which the credit could be removed and Judge McKusick's recognition that this Court's decisions permit states to effect such corrections, the Final Report recommends that New Hampshire be denied its opportunity to remedy the defect. Instead, the Report recommends that New Hampshire be required to refund all of its property tax receipts since the statute was enacted. If this Court were to accept this conclusion, New Hampshire's $1.4 million credit in favor of the out-of-state owners of Seabrook would cause it to forfeit more than

$33 million of property tax revenue that Judge McKusick's Report makes clear New Hampshire had the right to collect. The decisions of this Court require no such result.

The unfairness of the Report's recommendation is even more apparent because the credit against the business profits tax does not present the same statutory or constitutional problems that have invalidated state tax credits in the few cases cited by the Plaintiff States and relied on by the Special Master. The amount of the credit is determined in a neutral way that does not favor one taxpayer over another, either based on state of domicile, the level of business activity in New Hampshire, or any other basis. This Court in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 406 n.12 (1984), emphasized that "it is not the provision of the credit that offends the Commerce Clause, but the fact that it is allowed on an impermissible basis . . . ." All that the Plaintiff States have proven and the only thing that the Report identifies is that a credit against an income tax will benefit taxpayers with more taxable income allocable to New Hampshire more than it will benefit those with less taxable income allocable to New Hampshire. But the same situation confronted the *Westinghouse* Court, which clearly stated that it is not the provision of a credit that violates the Commerce Clause; it is only the allowance of a credit on an impermissible basis that presents a constitutional problem. Under this and other authorities, the credit provided by New Hampshire's Nuclear Station Property Tax statute, which actually has benefitted only out-of-state interests, does not violate the Commerce Clause or 15 U.S.C. § 391.

B. New Hampshire's Experience With Nuclear Power — The Seabrook Nuclear Power Station

The tax on Nuclear Station Property was imposed because, once Seabrook Nuclear Power Station went into service in the

summer of 1990, — i.e., went "on-line" — it presented significant new burdens and risks for New Hampshire. Not only was Seabrook the first and only nuclear power plant in the state, but it was the largest in New England. Because New Hampshire ultimately bears responsibility for assuring the safety and health of its residents, the commencement of operations at Seabrook required a level of emergency planning and preparedness that had been unnecessary when the state relied entirely on conventional generating plants. Moreover, it posed a risk which had not been presented by non-nuclear plants — the risk that the State of New Hampshire might be required to finance the extraordinary costs of a nuclear incident or other events that could lead to an early "decommissioning" of Seabrook. Stipulation ¶¶ 13.1, 13.9. The indirect impact of such an incident on the economy of the state, its tourist industry and its population, although impossible to quantify, posed an even greater threat to, and challenge for, state government. All of these burdens and risks had not existed in the pre-nuclear era in New Hampshire, but they were squarely presented by going on-line.

Going on-line was an important event for an additional reason. The construction and operation of an electric generating plant of any type is a major economic endeavor, particularly in a relatively small state. But the opening of New England's largest nuclear power plant was unquestionably the most significant economic event in the state in years. Nothing could compare with it. That it led to the imposition of a tax on the owners of this massive new generating plant is understandable and appropriate.[1]

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[1] The Seabrook plant is owned by a consortium of utilities, collectively known as "the joint owners." The joint owners are: The United Illuminating Company, New England Power Company, Connecticut Light and Power Company, Canal Electric Company, Montaup Electric Company, Taunton Municipal Lighting Plant, Massachusetts Municipal Wholesale Electric Co-

The real and potential economic burdens presented by Seabrook did not begin in the summer of 1990. For nearly 15 years, New Hampshire had been struggling with the special financial issues and public safety concerns presented by the construction of a major nuclear reactor in the state. The Nuclear Regulatory Commission issued a construction permit for Seabrook Station in 1976. Stipulation ¶ 3.19. The issuance of the permit was only the beginning of a long and costly process leading to the opening of Seabrook. As one of the Intervening Utilities explained, the development of a nuclear power plant is a difficult and controversial endeavor because "[t]here is widespread concern about the safety of nuclear generating plants and extensive public controversy concerning the further development of nuclear energy in the United States." Stipulation Attachment A § 3.

The difficulties encountered in efforts to develop nuclear power plants were described by another intervenor's parent corporation as being significant.

> Nuclear units in the United States have been subject to widespread criticism and opposition. Some nuclear projects have been canceled following substantial construction delays and cost overruns as the result of licensing problems, unanticipated construction defects and other difficulties. Various groups have by litigation, legislation and participation in administrative proceedings sought to prohibit the completion and operation of nuclear units and the disposal of nuclear waste.

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operative, the Town of Hudson (Massachusetts) Light and Power Department, EUA Power Company, Vermont Electric Generation & Transmission Cooperative and North Atlantic Energy Corporation (holder of the interest previously owned by Public Service Company of New Hampshire).

Stipulation Attachment A § 4. The development of Seabrook encountered all of these difficulties and more. In the words of another joint owner in December,1990, "[t]he licensing of Seabrook Unit I was plagued by lengthy delays and continues to be opposed by a number of intervening groups who have participated actively in administrative proceedings, filed numerous lawsuits and demonstrated at the construction site." Stipulation ¶ 13.4.

The financial impact of Seabrook on New Hampshire is illustrated by another chain of events — the decline and ultimate bankruptcies of the New Hampshire utilities that participated in the construction of Seabrook. As a result of the tremendous costs associated with the project, Public Service Company of New Hampshire ("PSNH"), went from owning 50% of the project to owning slightly more than 35% of Seabrook at the time it filed for protection under Chapter 11 of the Bankruptcy Code on January 28, 1988. Stipulation ¶ 3.6. In November, 1989 Northeast Utilities ("NU") negotiated the acquisition of PSNH and, after all regulatory approvals were received, PSNH and NU merged on June 5, 1992. Stipulation ¶ 3.6. The non-profit New Hampshire Electric Cooperative ("the New Hampshire Co-op"), another owner, followed with a Chapter 11 filing on May 6, 1991. Stipulation ¶ 14.5. The only other New Hampshire corporation owning an interest in Seabrook — EUA Power Corporation ("EUA Power") — also resorted to a bankruptcy filing in February, 1991. Stipulation Attachment A § 3.

The Seabrook project so crippled PSNH, New Hampshire's principal electric utility, and EUA Power that they provided no business profits tax revenue for the state. For the last six years of its separate existence, PSNH incurred losses and paid no business profits taxes to New Hampshire. Stipulation ¶ 17.1. EUA Power paid no business profits taxes either, filing returns from 1987 through 1990 reporting losses and no tax liability. Stipulation ¶ 17.1. Because the New Hampshire Co-op is not organized for gain or profit, it also paid no business profits

taxes. Stipulation ¶ 7.1. In the one year for which the New Hampshire Co-op filed a Business Profits Tax information return, it too reported a sizable loss.

Thus, once Seabrook went on-line, the New Hampshire legislature was presented with a policy question. Seabrook was the most costly piece of real property in the state and the largest nuclear power plant in New England. The plant posed unique burdens and risks for New Hampshire. As a matter of fairness and fiscal responsibility, Seabrook had to bear its share of the cost of state government and the special benefits of state services required by a major nuclear power plant.

The tax structure existing in New Hampshire in 1991 was inadequate to address the circumstances presented by Seabrook. PSNH and the New Hampshire Co-op were paying a total of about $6.5 million in electric utility franchise taxes, but most of the remaining owners, including EUA Power, paid nothing because they were not subject to the tax.[2] Stipulation ¶ 10.1-10.2. On the other hand, PSNH and the New Hampshire Co-op paid no business profits taxes. Stipulation ¶ 17.1. The business profits taxes paid by the out-of-state owners of Seabrook aggregated only about $1.9 million. Stipulation ¶ 17.1. With the costs of New Hampshire government exceeding $673 million, Stipulation Exhibit 6 at 26, Seabrook and its owners simply were not paying their fair share.

New Hampshire had traditionally relied on statewide property taxes to a larger extent than many other states, in part, because the state imposes no general sales or personal income taxes. Stipulation ¶¶ 11.2, 11.3, 12.3, 12.4. In the telecommuni-

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[2] Prior to 1991, all utilities selling electricity in the state were subject to a franchise tax in the amount of one percent on the gross receipts from sales of electricity within New Hampshire. RSA 83-C:2. Sales of electricity generated in New Hampshire, but sold outside the state, were exempt from the tax.

cations industry, the Telephone Tax — a statewide property tax — raised nearly $10 million in 1989. Stipulation ¶ 11.3.[3] Statewide property taxes are also used in the railroad industry.[4] Stipulation ¶ 12.4.

The beginning of service at Seabrook presented an obvious occasion for consideration of a statewide property tax of the type that had been used by the state in the telephone and railroad industries. A property tax on Seabrook could be measured by the very event that called for the tax — the new presence in New Hampshire of an exceedingly valuable, distinctive piece of real property. Moreover, the tax could be paid in proportion to the owners' interests in that property, an unassailably fair apportionment of the burden of the tax.

Thus, as the Seabrook plant began its first full year of operation in January, 1991, Stipulation ¶ 3.19, the New Hampshire legislature promptly addressed the new situation presented by the plant's opening and enacted the Nuclear Property Tax, imposing an *ad valorem* property tax at the rate of 0.64% on every dollar of assessed valuation of nuclear property within New Hampshire. RSA 83-D:3; Stipulation ¶ 2.1.[5] The tax applies to each owner of nuclear property "in the proportion that such person's ownership interest bears to the entirety of the ownership in the property." RSA 83-D:5; Stipulation ¶ 3.1. There is no differentiation in rate or application as to taxpayers

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[3] In 1990, the legislature restructured state taxation of the telecommunications industry with the repeal of the telephone tax and the adoption of the Communications Services Tax, which became effective on March 31, 1990.

[4] The Supreme Court of New Hampshire noted in 1970 that "[r]ailroads and telephone companies are presently subject to a state property tax upon their estates at the state level, according to the current average property rate." *Opinion of the Justices*, 110 N.H. 117, 123, 262 A.2d 290, 295 (1970).

[5] The New Hampshire Revised Statutes Annotated are referred to as "RSA ____."

engaged in interstate versus intrastate commerce. The tax applies only to electric utilities owning interests in Seabrook. It does not apply to Plaintiffs — Connecticut, Massachusetts or Rhode Island — or to their citizens. In addition, just as the Telephone Tax had been repealed when the state's tax structure was reviewed and revised with the introduction of the Communication Services Tax, the introduction of an even-handed Nuclear Property Tax presented the occasion to reconsider the tax structure applicable to electric utility owners of Seabrook. The conclusion was the enactment of the Nuclear Property Tax, accompanied by a repeal of the franchise tax as applied to electric utilities.[6] Stipulation ¶ 2.3.

The result of these revisions avoided inequitable division of the tax burden associated with the existence of Seabrook. All joint owners would pay the tax at the same rate. For the intrastate utilities owning an interest in Seabrook — PSNH, the New Hampshire Co-op and EUA Power — the repeal of the franchise tax and the enactment of the Nuclear Property Tax resulted in an increase in tax liability of more than $4 million, from about $6.5 million per year to more than $11 million. Stipulation ¶ 10.2. For interstate utilities owning the remainder of Seabrook, it meant that, henceforth, they would pay their share of Seabrook's statewide property tax burden — approximately $11 million. Moreover, the tax would be paid regardless of whether the co-owners were realizing profits or whether Seabrook was actually generating electricity.

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[6] As Senator Thomas Colantuono, Vice Chairman of the Senate Ways and Means Committee, explained:

> We went to a property tax, because we have had prior experiences with property taxes from the telephone tax, which was a property tax on telephone company equipment. Some of you may remember that last year we replaced that tax with a broader communications tax. But for many years, we had a property tax on telephone equipment. This is similar.

Hearing Transcript, May 2, 1991 at 2.

The remaining issue considered by the legislature was the role, if any, that should be played by the Business Profits Tax in the new system for taxation of Seabrook's owners. The Business Profits Tax had been providing no revenue for the state from the New Hampshire electric utilities owning interests in Seabrook. Stipulation ¶ 17.1. The revenue produced by the Business Profits Tax, as applied to electric utilities, came entirely from out-of-state corporations doing business in the state, most of which were members of holding company groups having business interests in more than one state. Stipulation ¶¶ 17.1, 1.5-1.7, 5.6, 5.11, 5.15, 5.24.

Given the unimportance of the Business Profits Tax as applied to electric utilities in the past, the uncertainty of the tax as a source of revenue due to the record of losses incurred by Seabrook's New Hampshire owners and the decision to rely on an *ad valorem* property tax on Seabrook's owners, the legislature essentially abandoned the Business Profits Tax for all Seabrook owners. The mechanism chosen to accomplish this result was already present in the Business Profit Tax statute — a list of credits against the business profits tax enumerated in RSA 77-A:5. The legislature used this existing mechanism and added the new Nuclear Property Tax to the list of credits.

After this change, the only remaining role for the Business Profits Tax for Seabrook's owners was, as a practical matter, insignificant. The tax would come into play only if an owner of Seabrook had business profits that were so large that they would produce a Business Profits Tax obligation in excess of the owner's Nuclear Property Tax payment. For the New Hampshire utilities owning an interest in Seabrook, business losses rather than profits were the rule. The new Business Profits Tax was essentially an "excess profits" tax and, for corporations incurring losses, an excess profits tax was meaningless. Moreover, although the interstate utilities and holding companies owning interests in Seabrook had earned substantial profits in the preceding five years, Stipulation ¶ 18.1, the significant Nu-

clear Property Tax credit made the new excess profits tax, essentially, a meaningless matter for them as well.

In short, given that the Business Profits Tax applied only to the extent that an owner's profits were extremely high, New Hampshire's new system for taxing the owners of Seabrook was a system of *ad valorem* property taxation. Each owner of Seabrook would pay a property tax at the same rate based on its ownership interest in Seabrook, and nothing more. If business profits taxes are ever paid, they are most likely to be paid by the owners doing the most business in New Hampshire, not the least. New Hampshire has no control over the decisions of other states to impose income taxes and because the Plaintiff States each tax income properly apportioned to them, Seabrook owners may pay income taxes to those states. But that result is not attributable to anything New Hampshire has done. With respect to the matter within its control — the taxation of income within New Hampshire — the state has adopted a system that would impose income taxes only on the most profitable companies doing substantial amounts of business within New Hampshire. This approach is not discriminatory under the Commerce Clause or under 15 U.S.C. § 391.

ARGUMENT

A. The Nuclear Property Tax Is An *Ad Valorem* Tax On Real Property And Cannot Constitute A Burden On Interstate Commerce (Background To Specific Arguments in Support of Exceptions)

It has long been recognized that "States have considerable latitude in imposing general revenue taxes." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622 (1981). For this reason, this Court's decisions assessing the constitutionality of state tax structures are guided by the principle that:

> We have always "declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'"

Trinova Corp. v. Michigan Dep't of Treasury, 111 S.Ct. 818, 836 (1991) (citation omitted). The New Hampshire legislature was entitled to recognize the commencement of operations at Seabrook as a significant event calling for a new approach to the state's tax provisions affecting electric utilities. In doing so, it enacted a nondiscriminatory *ad valorem* Nuclear Property Tax that clearly satisfies all constitutional requirements.

Plaintiffs,[7] the Intervening Utilities and the *amici curiae* contend that electricity generated at the Seabrook Plant is often sold in interstate commerce and that a property tax on the plant constitutes an unconstitutional burden on interstate commerce. But this Court's decisions have made it clear that a state tax which affects interstate commerce is perfectly permissible "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The best example of such a tax is an *ad valorem* real property tax.[8] The Special Master agreed, concluding that New Hampshire's property tax by itself does not violate the Commerce Clause. Final Report at 26 n.17. This conclusion is supported by a long line of decisions of this Court.

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[7] Plaintiffs refers to both the Plaintiff States and the intervening utilities unless the context indicates otherwise.

[8] Commentators have summarized the point in these words: "[a]rguably, the clearest example of state taxation that should not be subject to commerce clause review is *ad valorem* real property taxation." Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *Symposium on State and Local Taxation: An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 Vand. L. Rev. 879, 892 (1986).

1. Real Property Taxes Have Long Withstood Challenge Under The Commerce Clause

The right of states to impose *ad valorem* real property taxes without offending the Commerce Clause has long been established and has survived the periodic reformulations of the tests used in Commerce Clause cases. In *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 220 (1897), the Court stated:

> [W]hatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution.

Similar observations appear in the decisions throughout this century.[9]

The unquestionable validity of *ad valorem* real property taxes results in the absence of any modern authorities considering Commerce Clause challenges to such taxation and investigation reveals no case in which an *ad valorem* real property tax has ever been invalidated under the Commerce Clause. This Court in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609,

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[9] *E.g.*, *Wells, Fargo & Co. v. Nevada*, 248 U.S. 165, 167 (1918) ("[W]hat was taxed was the company's property in Humboldt County . . . . [C]onsistently with the commerce clause of the Federal Constitution, the State could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the State, although chiefly employed in such commerce."); *St. Louis & E. St. L. Elec. Ry. v. Missouri*, 256 U.S. 314, 318 (1921) ("[W]hile a State may not, in the guise of taxation, constitutionally compel a corporation to pay for the privilege of engaging in interstate commerce, . . . this immunity does not prevent the State from imposing an ordinary property tax upon property having situs within its territory and employed in interstate commerce."); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254-55 (1938) ("It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. 'Even interstate business must pay its way,' and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of

624 (1981), underscored the special nature of real property taxes when it upheld Montana's severance tax on coal against a Commerce Clause challenge, stating:

> In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs State . . . .

To the extent that Commerce Clause decisions deal with "property" taxes at all, they have focused on movable personal property in the stream of interstate commerce. Such cases present questions about the nexus of the property with the state, the method of apportionment of the tax and the resulting risk of multiple taxation that cannot occur when dealing with real property taxation. Other cases involve taxes that are labelled "property" taxes, but are in fact measured by gross receipts, such as the tax considered by the Court in *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 13-14 (1983).

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state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce.") (citations omitted); *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 368 (1940) ("That the states may classify property for taxation; may set up different modes of assessment, valuation and collection; may tax some kinds of property at higher rates than others; and in making all these differentiations may treat railroads and other utilities with that separateness which their distinctive characteristics and functions in society make appropriate — these are among the commonplaces of taxation and of constitutional law."); *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 323 (1968) ("It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. That fair share may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State, including a portion of the intangible, or 'going concern,' value of the enterprise. . . . [T]he States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders.") (citations omitted).

It is indisputable that the Nuclear Property Tax is an *ad valorem* tax on real property in New Hampshire. Stipulation ¶ 2.1. The claim that such a tax discriminates against interstate commerce bears no relation to any challenge to state taxation that this Court has ever seriously considered. As the Court stated last year in *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S.Ct. 818, 836 (1991) (citations omitted):

> In reviewing State taxation schemes under the Commerce Clause, we attempt "to ensure that each State taxes only its fair share of an interstate transaction." We act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions.

Ad valorem real property taxation presents none of the concerns that underlie the Court's Commerce Clause decisions. If any "safe harbor" of state taxation remains, surely New Hampshire's Nuclear Property Tax falls within it.

2. The Fact That Interstate Utilities Own Interests in Seabrook Is Irrelevant

Any argument that nonresidents owning property in New Hampshire and engaging in interstate commerce cannot be required to pay their proportionate share of an *ad valorem* property tax clearly fails to state a claim, whether their ownership interest exceeds 50%, 75%, or even if it reaches 100%. Any such claim is foreclosed by established law, settled for more than 100 years. The Special Master agreed, concluding that "[t]he fact that about 60% of the Seabrook Station is owned by utility companies selling electricity directly or indirectly to out-of-state consumers" does not invalidate the tax. Final Report at 26 n.17.

His conclusion is correct for several reasons. First, as a general matter, no such claim could be made because it is beyond question that "interstate commerce must bear its fair share of the state tax burden," *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 620 n.9 (1981), and "may constitutionally be made to pay its way." *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden . . . ." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). This Court has long rejected the notion that a "state tax must be considered discriminatory for purposes of the Commerce Clause if the tax burden is borne primarily by out-of-state consumers." *Commonwealth Edison*, 453 U.S. at 618. It is the settled rule that so long as a tax "is computed at the same rate regardless of the final destination of the [power], and there is no suggestion . . . that the tax is administered in a manner that departs from this evenhanded formula," there is no constitutional infirmity. *Commonwealth Edison*, 453 U.S. at 618.

Second, the specific question whether the out-of-state residence of a property owner confers immunity from state property taxes has been considered and rejected. *E.g.*, *Bacon v. Illinois*, 227 U.S. 504, 512 (1913) ("[In *Coe v. Errol*], the claim of immunity [from taxation] by reason of the fact that [the property] was owned by non-residents was at once disposed of."); *Southern Ry. v. Greene*, 216 U.S. 400, 415 (1910) ("It does not lie in a foreign corporation to complain that it is subjected to the same law with the domestic corporation."); *Coe v. Errol*, 116 U.S. 517, 524 (1886) ("We have no difficulty in disposing of the last condition of the question, namely, the fact . . . that the property was owned by persons residing in another State; for, if

not exempt from taxation for other reasons, it cannot be exempt by reason of being owned by non-residents of the State").[19]

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court upheld Montana's severance tax on coal as applied to utilities selling to out-of-state customers, even though 90% of the coal mined in Montana was exported to other states. The resulting taxes, paid by nonresidents of Montana, accounted for almost 20% of Montana's tax revenue. In response to the utilities' claim that the tax must be considered discriminatory because its enormous burden was being borne primarily by out-of-state consumers, this Court concluded:

> [T]here is no real discrimination in this case; the tax burden is borne according to the amount of coal consumed and not according to any distinction between in-state and out-of-state consumers.

Id. at 618.

The same observation can be made here. The burden of the tax is borne in proportion to ownership interests in New Hampshire property, not in accordance with the residence of the owners. Moreover, unlike in *Commonwealth Edison*, at the time the Nuclear Property Tax was enacted, interstate utilities owned only slightly more than 50% of Seabrook and, given that ownership structure, New Hampshire utilities (including PSNH, The New Hampshire Co-op and EUA Power) would

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[19] The significance of out-of-state ownership is even more questionable in this case. For example, if, instead of being held by the utilities as tenants in common, Seabrook were owned by a single corporation, with a consortium of utilities holding stock interests, the corporation itself would be liable for the nuclear property tax and the net expense would be allocated to the utility shareholders on a per-share basis. If the corporation owning Seabrook were organized under New Hampshire law, for ownership purposes, Seabrook would be considered 100% owned by a New Hampshire resident.

have paid roughly one half of the tax. The remaining $11.5 million of Nuclear Property Tax that would have been paid by out-of-state utilities would account for about 1.7% of New Hampshire's General Fund Cash Expenditures which exceeded $673 million in the fiscal year ended June 30, 1991. Stipulation Exhibit 6 at 26. The out-of-state owners of the largest nuclear power plant in New England clearly are not paying more than their fair share of the costs of New Hampshire state government when their contribution is so modest.

3. Settled Law Bars Plaintiffs' Fallback Claim That Seabrook Was Impermissibly Classified

The Intervening Utilities advanced a fallback argument that New Hampshire does not have the right to classify nuclear property for purposes of imposing a property tax or that it may not tax Seabrook Station because it is owned by out-of-state interests. For the reasons previously described in subsection 2, it is clear that the out-of-state ownership of Seabrook is irrelevant to an assessment of the validity of New Hampshire's property tax. The classification of the property subject to the tax need only satisfy the liberal standards traditionally applied to state tax classifications under the Equal Protection Clause. The Special Master agreed, rejecting the Intervenors' classification argument under the Commerce Clause and under 15 U.S.C. § 391. Final Report at 19 n.11 and 26-27 n.17. In doing so, he stated:

Under the ownership component of Plaintiffs' argument, the constitutionality of the tax would turn on the use of corporate or joint ownership, not on whether the tax and credits or exemptions apply evenhandedly to each taxpayer. Similarly, if the ownership interests in Seabrook continue to be traded, Stipulation ¶¶ 3.7, 3.9 and 3.18, it is possible that a New Hampshire utility serving retail customers in the State could eventually own 100% of Seabrook. Presumably, under the ownership component of Plaintiffs' argument, the Nuclear Property Tax would only become nondiscriminatory at that moment.

> It would be hard to say that New Hampshire did not have a reasonable basis for establishing different tax schemes for a nuclear plant, indeed the largest nuclear plant in New England, and fossil fuel and hydro plants.

Final Report at 27 n.17.

The Special Master's conclusion was clearly correct. In *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992), the Court reaffirmed the broad discretion of states to establish classifications for taxing purposes and upheld California's property tax classification permitting longer-term owners of property to pay lower taxes than newer owners of comparable property. Noting that the standard of review is "especially deferential," the Court quoted the general rule endorsed in prior case law:

> In structuring internal taxation schemes the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.

112 S.Ct. at 2332 (citations and quotation marks omitted). The Courts will uphold a state's decision to impose a tax if there is "a plausible policy reason for the classification." *Id.*

New Hampshire's decision to tax nuclear station property, rather than conventional generating plants, clearly falls within its power to classify under the standards applied by this Court. The New Hampshire legislature made specific findings in support of its decision. It found that:

I. Nuclear station property is the only property in the state that generates electricity from the fission of atoms.

II. Creating electricity from the fission of atoms imposes unique responsibilities on the state.

III. A nuclear station creates special and unique public safety requirements and burdens on the state.

IV. A nuclear station has a unique and long lasting impact on the environment which creates burdens on the state.

RSA 83-D:1. These findings are legislative judgments that support the decision to impose a tax on nuclear station property. There is no basis under the Constitution or any federal statute to disregard these findings or to substitute Plaintiffs' judgment for that of the New Hampshire legislature. The record in this case establishes that there are unique burdens associated with nuclear reactors, including the dangers inherent in the production of nuclear energy, and in dealing with its waste. Stipulation ¶¶ 13.1, 13.3-13.9, Attachment A.[11] After the accidents at Three Mile Island and Chernobyl, there can be no serious question that the mere existence of a nuclear power plant places a unique burden on the host state. The Special Master properly rejected Intervenors' argument that New Hampshire lacks the power to classify Nuclear Station Property for taxation.

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[11] The sharp differences between a nuclear and fossil fuel electric power plant in terms of their impact on the State and its citizens clearly warrant a separate classification of the nuclear power plant. The regulations issued by the Federal Nuclear Regulatory Commission reflect the extraordinary costs, risks and burdens to which the State and local governments are subjected by a nuclear power plant located in the State. See the N.R.C. regulations dealing with the licensing of nuclear power plants (10 C.F.R. Part 51 (1992)), the handling of nuclear materials (10 C.F.R. Part 70 (1992)), the packaging and transportation of nuclear materials (10 C.F.R. Part 71 (1992)), the storage of spent nuclear fuel and high-level radioactive waste (10 C.F.R. Part 72 (1992)) and the physical protection of plants and materials (10 C.F.R. Part 73 1992)). The great magnitude of the costs and other burdens that may be imposed on State and local governments by nuclear power plants is indicated by the decision of the Atomic Safety and Licensing Appeal Board in *Matter of Long Island Lighting Co.* (Shoreham Nuclear Power Station, Dec. 12, 1986, Nuclear Regulatory Commission Decisions (CCH) ¶ 31,003.01) dealing with population evacuation in the event of an accident at the Shoreham plant.

B. The Nuclear Property Tax Does Not Violate The Commerce Clause (Recommendation C)

The Plaintiff States conceded that the Nuclear Station Property Tax statute satisfies three of the components of the four-part test of *Complete Auto*. Final Report at 13. Their entire argument was based on the contention that New Hampshire's tax discriminates against interstate commerce. They contended that the statute discriminates on its face and, in the alternative, that it has discriminated in actual effect. The Special Master accepted the Plaintiffs' arguments without critical analysis and concluded that the tax discriminates both on its face and in effect. In reaching this conclusion, the Final Report fails to apply the appropriate standards for assessing the constitutionality of a state statute and disregards the only evidence in the record about the actual effect of the statute, relying instead on hypothetical examples that are inconsistent with the facts in this case.

1. The Nuclear Property Tax Does Not Discriminate On Its Face

The Special Master correctly concluded that New Hampshire's property tax, by itself, is valid. The entire basis for the

Final Report's recommendation that the Court find in favor of the Plaintiff States is that the credit against New Hampshire's business profits tax discriminates against interstate commerce. The Report concludes that the credit discriminates on its face, but never discusses or applies the standard for determining facial invalidity. Had the correct standard been applied, the Special Master would have had to conclude that the statute is constitutional on its face.

Any party challenging the constitutionality of a tax has the burden of proof, *Norton Co. v. Dep't of Revenue*, 340 U.S. 534, 537-38 (1951); *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 750 (1978), but one who contends that a tax is unconstitutional on its face has a special burden. As the Court stated in *United States v. Salerno*, 481 U.S. 739, 745 (1987):

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid .... We think respondents have failed to shoulder their heavy burden to demonstrate that the Act is "facially" unconstitutional.

Instead of applying this test, the Special Master turned the test on its head, in effect adopting an entirely new standard under which a state tax system is invalid if any circumstance can be imagined in which discrimination would result. This new test is clearly contrary to *Salerno*.

Under the appropriate *Salerno* test, the Nuclear Property Tax is valid on its face. The Nuclear Property Tax is imposed on all owners of nuclear station property in proportion to their ownership (RSA, Sec. 83-D:5) and there is no distinction made in the statute between owners selling electricity in interstate commerce and those selling in intrastate commerce. There is no

differentiation in the allowance of the credit against the business profits tax or in the amount of the credit depending on whether the taxpayer is an interstate or an intrastate utility, or whether the electricity generated at a nuclear power station is sold within or without the state. There is no basis for concluding from the face of the statute that discrimination will ever result from its operation. There is certainly no basis for concluding, as the test of facial invalidity requires, that discrimination will always result in every circumstance.

The New Hampshire's system is in sharp contrast to the taxing statutes which this Court has held to be facially discriminatory. For example, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the statute exempted from the Louisiana First Use Tax outer continental shelf ("OCS") gas consumed in Louisiana, but not OCS gas consumed outside the state. In *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984), the New York tax allowed a credit for DISC export sales only if they were "shipped from a regular place of business of the taxpayer within [New York]". In *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), the statute provided for preferential tax treatment of nonresidents if they made their sales in New York. In *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), the statute exempted from the measure of the state's sales tax labor or service costs incurred in manufacturing machinery in the state, but included such costs in the use tax if the manufacturing took place outside the state.

In all those cases the language of the statutes explicitly provided for preferential tax treatment of intrastate commerce as compared to interstate commerce. Because the language of the statutes required preferential treatment, no set of circumstances existed in which the acts could be valid. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). In contrast, no discrimination between intrastate and interstate commerce is to be found on the face of the New Hampshire Nuclear Property Tax statute or the business profits tax statute. Where a statute

is not facially discriminatory, as in this case, taxpayers have the burden of demonstrating by facts or factors outside the statute, that discrimination against interstate commerce exists.

Not only does the language of New Hampshire's statute eliminate any basis for contending that facial discrimination is present, but the facts in the record establish that the New Hampshire system is valid under the *Salerno* test. Although Plaintiffs contended that, in effect, New Hampshire utilities avoid the burden of the Nuclear Property Tax while out-of-state owners of Seabrook do not, the record demonstrated, and the Special Master found, that all owners paid the tax. Collectively, they paid $11.2 million for the last half of 1991 in direct proportion to their ownership interests in Seabrook. Final Report at 7. For 1992, they paid approximately $24 million. Final Report at 8.

Plaintiffs also contended that the New Hampshire tax system discriminates on its face by treating owners differently for business profits tax purposes. The record demonstrates, and the Special Master found, that this contention was also incorrect. The Final Report concludes that "for both 1992 and 1993, no Seabrook joint owner will pay the Business Profits Tax." Final Report at 11, 29 n.18. Plaintiffs offered no evidence concerning any other future years and the Special Master indicated that experience and the Intervenors' projections demonstrate that, "as a practical matter," the Seabrook owners will never pay any business profits taxes. Final Report at 29 n 18.

The facts in the record and the Special Master's findings establish all that is necessary to defeat a claim that the Nuclear Property Tax discriminates on its face. The only "set of circumstances" that measures the actual effect the tax has had demonstrates that no discrimination results. All of the owners paid the Nuclear Property Tax. No owner avoided payment of it.

Even if the extent to which owners claimed credits against their business profits tax liability were relevant, the evidence demonstrated no favoritism toward owners engaged in intrastate sales of electricity. The few owners engaging solely in intrastate sales of electricity did not claim a Nuclear Property Tax credit because they had no business profits tax liability. Four of the owners engaged in interstate sales of electricity — Canal, UI, CL&P and New England Power — claimed Nuclear Property Tax credits offsetting $1,470,620 of business profits taxes that would otherwise have been owed to New Hampshire for 1991. These circumstances prove that New Hampshire's tax system does not discriminate on its face.

The Special Master's Final Report does not and could not question any of these facts, each of which is established by the record. The Report makes no finding that any New Hampshire owners of Seabrook or any New Hampshire consumer received favored treatment under the statute. It makes no finding that they will ever receive favored treatment in the future because they will not.

In short, Plaintiffs and the Intervening Utilities failed to establish that the Nuclear Property Tax discriminates on its face. The language of the statute contains no preferential provisions of the type that have resulted in determinations of facial invalidity in other cases. The *Salerno* test of facial validity is therefore satisfied because all of the facts in the record demonstrate that the tax operates fairly and does not discriminate in favor of utilities engaging in intrastate sales of electricity or in favor of New Hampshire citizens.

2. The Nuclear Property Tax Results In No Multiple Taxation And Is Internally Consistent

Because the Nuclear Property Tax satisfies the test of facial validity set forth in *United States v. Salerno*, 481 U.S. 739, 745

(1987), Plaintiffs did not attempt to meet their burden of establishing that the tax is invalid on its face under that standard. Instead, they suggested use of an alternative standard — the internal consistency test, relying on this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984), which applied the test in the context of alleged discrimination. The Special Master accepted the Plaintiffs' suggestion and applied the internal consistency test, but did so without any discussion of the numerous opinions of this Court indicating that the test should not be applied in a case of this type. The Special Master's reliance on the internal consistency test is thus misplaced because the test is not relevant to any issue presented here.

The role of the internal consistency test in Commerce Clause cases has been the subject of considerable controversy. The only application of the test which is not controversial is the application for which it was originally designed — to identify whether state taxes are properly apportioned. The test was announced in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), in which the Court considered the constitutionality of a California corporate franchise tax that assigned income of multi-state corporations to California using a three-factor formula. Beginning from the proposition that the formula used to apportion income must "be fair," the Court stated:

> The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency — that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed.

Id. at 169.

Since *Container Corp.* was decided, the internal consistency test has generally been referred to as an apportionment test.

American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 284 (1987) (unapportioned flat tax on interstate and intrastate trucks violates internal consistency test); *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) ("[W]e determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent.");[12] *Trinova Corp. v. Michigan Dep't of Treasury*, 111 S.Ct. 818, 832 (1991) ("Trinova does not contest the internal consistency of the SBT's apportionment formula, and we need not consider that question.").

In two cases, decided in 1984 and 1987, *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), and *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987), the internal consistency test was used for a different purpose. In those cases, which will be discussed in more detail in this section, the business and occupation taxes contained exemptions making them facially discriminatory under the test of *United States v. Salerno*, 481 U.S. 739, 745 (1987). But in both cases, the state raised as a defense the argument that the discriminatory taxes were "compensating taxes" — in the sense that "use" taxes on interstate sales compensated for the absence of sales taxes on such transactions. *See Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937). After reasoning that the two taxes were not compensating taxes, the Court applied the internal consistency test to determine, without referring to actual facts, whether the challenged tax resulted in a discriminatory multiple tax burden. By assuming that every other state imposed the same tax system as the defendant state, the Court concluded that the multiple tax burden existed, thereby confirming its conclusion that the challenged taxes could not be defended as compensating taxes.

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[12] In *Goldberg v. Sweet*, the Court sustained an Illinois tax on the full charge for interstate telecommunication that originated or terminated in the State, if the communication was charged to an Illinois service address. The Court found that the Illinois tax satisfied the internal consistency test.

Apart from its mainstream use as a test of apportionment formulas and its isolated use to evaluate compensating tax defenses in *Armco* and *Tyler Pipe*, the internal consistency test has played no role in Commerce Clause cases. And yet, the mere possibility that it might be used in any other context has engendered substantial controversy. For example, a dissenting opinion in *Scheiner*, rejected the idea that *Armco* establishes "a grandiose version of the 'internal consistency test' as the constitutional measure of all state taxes under the Commerce Clause." 483 U.S. at 266. In *Tyler Pipe*, a dissent commented that, prior to *Armco*, "the internal consistency test was applied only in cases involving apportionment," *Id.* at 256, and expressed the view that the "internal consistency principle is nowhere to be found in the Constitution." *Id.* at 254. In *Trinova*, the majority wrote that, beyond facial discrimination, the "deeper meaning" of the Commerce Clause mentioned in *Scheiner* refers only to "the requirement of fair apportionment, as expressed in the tests of internal and external consistency," once again confining the internal consistency test to the fair apportionment question.

Given the limited role of the internal consistency test and the controversy concerning its application to any question other than apportionment, the Final Report's assumption, without analysis, that the test applies in this case is unpersuasive. Once again, the Special Master recommends that the Court break new ground, severely limiting the power of the states to rely on different taxing principles. A careful review of this Court's deci-

sions and the circumstances in which the internal consistency test has been applied clearly suggest that the test has no application here.[13]

i. The Internal Consistency Test Is Primarily Concerned With Multiple Taxation Of The Kind That Results From Unapportioned Taxes

The primary function of the internal consistency test is to identify situations in which states impose unapportioned taxes, presenting the risk that a taxpayer's income, sales, receipts or other subjects of taxation will be taxed twice. It is this risk of multiple taxation that results in special scrutiny of taxes that appear to pose such a danger.[14] As the cases demonstrate, however, the concern of the Court has not been with the number of different taxes a taxpayer may become obligated to pay to different states. Instead, the Court has rejected efforts to impose two or more taxes on the same income, sales, receipts or other subjects of taxation.

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[13] None of the cases in which this Court has dealt with the internal consistency test involved a tax credit against any other tax and there is nothing in the language of any of those cases that suggests that the internal consistency test applies to offsetting credits for other taxes. The test has never been applied to invalidate an *ad valorem* property tax.

[14] The multiple taxation doctrine was enunciated by Justice Stone in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). The Court was concerned about the "multiplication of state taxes" that results from a state tax that imposes on interstate "commerce burdens of such a nature as to be capable in point of substance, of being imposed . . . with equal right by every state which the commerce touches, *merely* because interstate commerce is being done, so that without the protection of the Commerce Clause, it would bear cumulative burdens not imposed on local commerce." 303 U.S. at 255-56.

The Court in *Container Corp.* made this focus clear by stating that application of the internal consistency test results in "no more than all of the unitary business' income being taxed." 463 U.S. at 169. In *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), the Court explained that the purpose of the apportionment requirement is "to ensure that each State taxes only its fair share of an interstate transaction," and, therefore, "[t]o be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result." (citations omitted).

It was concern over multiple taxation that led the Court in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 284-87 (1987), to invalidate Pennsylvania's flat tax on truckers. A tax on truckers that had been measured by the number of miles driven in the state would have presented no problem because, even if every state imposed such a tax, no multiple taxation would result. Each state would collect a tax in proportion to the number of miles driven in the state. No state would be taxing miles driven in another state. But, because Pennsylvania's tax was not apportioned, enactment of the same flat tax system in every other state would have resulted in the taxation by each state of far more than its share of annual trucking mileage in the state. Interstate truckers under such an unapportioned flat tax system would clearly have incurred a multiple tax burden whereas intrastate truckers would not. *See United States v. Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989) (discussing *Scheiner* and stating that the Pennsylvania tax imposed a "much higher charge per mile traveled" on out-of-state vehicles).

Although Plaintiffs relied on *Scheiner* and the Final Report cites it as if it had some relevance (Final Report at 38), the tax at issue in that case bears no similarity to the tax challenged here. The concern that the Court expressed in *Scheiner* — the risk of multiple taxation arising from an unapportioned tax — is not presented in this case. An analysis of both aspects of the system — the Nuclear Property Tax and the excess business

profits tax — confirms the conclusion that New Hampshire's system for taxing owners of Seabrook presents no risk of multiple taxation.

By itself, the Nuclear Property Tax clearly presents no risk of multiple taxation. This is because, unlike the flat tax in *Scheiner*, the Nuclear Property Tax is an *ad valorem* property tax, apportioned precisely in accordance with ownership interests in property located in New Hampshire. Only New Hampshire could enact such a tax on Nuclear Station Property located in that state and New Hampshire taxes only each owner's proportionate interest in the property. Thus, each owner pays its fair share of the tax and there is no risk of multiple *ad valorem* taxation of the nuclear property.

Similarly, New Hampshire's system of taxation of the business profits of Seabrook owners results in no multiple taxation. The Seabrook station is in New Hampshire. Stipulation ¶ 3.1. It is operated by employees who work in New Hampshire. Stipulation ¶ 7.46. No part of the Seabrook station property is located in any state other than New Hampshire. Consequently, the profits of the out-of-state owners of Seabrook from these operations would not be taxable in their home states.

No multiple taxation of any Seabrook owner's profits will ever occur. Due Process and Commerce Clause principles prohibit other states from taxing income attributable to New Hampshire:

> The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345 (1954). The reason the Commerce Clause includes this limit is self-evident: in a

> Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation. But the Due Process Clause also underlies our decisions in this area. Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, see *Quill Corp. v. North Dakota*, 504 U.S. __, __-__ (1992), we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax. See *id.*, at __, (quoting *Miller Bros., supra*, 347 U.S., at 344-345).

Allied-Signal Inc. v. Director, Div. of Taxation, 112 S.Ct. 2251, 2258 (1992).

The corporate business profits and income taxes of New Hampshire and the tax systems of all of the Plaintiff States recognize these constitutional limitations on their taxing powers. Their statutes provide for the apportionment of business profits or net income of corporations that conduct business within and without the state. All four states use the three-factor property, payroll and sales formula that is in force in most of the states that tax corporate profits or income. (*See* ¶ 233, RIA All States Tax Guide). Consequently, the out-of-state utility owners of Seabrook are not subjected to a risk of multiple taxation of income or profits from the Seabrook plant.

Not only is there no risk of multiple taxation, but, to the contrary, what New Hampshire has done is essentially to abandon the business profits tax for owners of Nuclear Station Property, foregoing the opportunity to impose such a tax on profits attributable to New Hampshire except to the extent that exceptionally large profits are earned. New Hampshire's decision not to tax a portion of the business profits that it is clearly entitled

to tax results in no multiple taxation. Instead, it results in certain profits remaining untaxed by any state.[15]

Because New Hampshire's system presents no risk of multiple taxation, the Final Report's evaluation of the system under the internal consistency test, which searches for multiple taxation, is clearly misplaced. As the Court stated in *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989):

> To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result.

As discussed in the next section, if every state imposed the Nuclear Property Tax system New Hampshire adopted, no multiple taxation or discrimination of any kind would result.

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[15] The effect of New Hampshire's decision not to impose ordinary business profits taxes on owners of Nuclear Station Property can be illustrated by considering UI's 1991 earnings and state income taxes. UI earned $12,901,110 in 1991. Stipulation ¶ 7.15. Nearly half of UI's property was located in New Hampshire. Under its three factor apportionment formula, New Hampshire was entitled to tax slightly more than 13%, or $1,726,517 of UI's profits. Stipulation ¶¶ 7.14-7.15. Nonetheless, New Hampshire elected to assess no business profits tax on UI and thus did not tax that $1,726,517 of profits. Under Connecticut law, that $1,726,517 of UI's profits escape taxation because Connecticut apportions its taxpayers' income within and without the state and:

> For purposes of apportionment of income under this section, a taxpayer is taxable in another state . . . if such state has jurisdiction to subject such taxpayer to such a tax, regardless of whether such state does, in fact, impose such a tax.

Conn. Gen. Stat., Corporation Business Tax 12-218 (1989). Thus, UI's income is not subjected to multiple taxation. Instead, the New Hampshire portion of that income remains untaxed.

ii. Even If The Internal Consistency Test Applied, New Hampshire's Tax System Satisfies The Test

Even if the internal consistency test applied in this case, a correct application of the test shows that New Hampshire's system would satisfy it. The test hypothesizes the existence of New Hampshire's system in other states and analyzes the effects the system would have if it existed everywhere. Thus, application of the test in this case would involve assuming that all states imposed *ad valorem* property taxes on Nuclear Station Property and allowed payments of their nuclear property tax to be credited against their business profits taxes.

No multiple taxation results from hypothesizing the existence of New Hampshire's nuclear property tax system in every state. Every state would impose only one nuclear property tax on nuclear property located in the state.[16] No plant would be subjected to multiple taxation because each state could impose an *ad valorem* tax only on the property within its borders. And because nuclear property tax payments would be credited against business profits taxes in every state, no state would impose business profits taxes on the income of nuclear property owners unless that income was so large that it would have resulted in a tax obligation in excess of the amount of nuclear property tax paid.

The Special Master's effort to apply the internal consistency test results in a different conclusion — that some nuclear property owners "are subject to two taxes, the Seabrook Tax plus a business profits tax owed to other states." Final Report at 37. He reaches this conclusion, however, by making an incorrect

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[16] In fact, Vermont does impose a tax on nuclear property, which has not been challenged by the owners of Vermont Yankee, some of whom are Intervenors in this case. Vt. Stat. Ann. tit. 32 8601, 8661; Stipulation ¶ 6.24.

assumption that forces the result. This incorrect assumption is that, under the internal consistency test the effects of the nuclear property tax system in other states should be considered for taxpayers "owning no other nuclear property," apart from their interest in Seabrook. Final Report at 37. In other words, the Special Master hypothesizes that other states would impose nuclear property tax systems but would have no nuclear property within their borders — a most peculiar assumption. The effect of this hypothesis, of course, is that the assumed tax system makes no sense in any of the other states because the whole point of the system — to rely primarily on taxation of nuclear property, rather than on taxation of income from that property — is defeated.

If the internal consistency test is to be applied in this case, it must be applied in a sensible way. Because it is a nuclear property tax system, any hypothetical application of the system must assume the existence of nuclear property.[17] When the test is applied with this logical assumption, the result is that the system functions just as New Hampshire intended it to function. It causes all states to rely on a property tax as the principal source of revenue from owners of nuclear property and it eliminates business profits taxes in every state for all but the most profitable owners, who, at most, might become subject to the excess profits feature of New Hampshire's system.

Thus, unlike the unapportioned flat tax in *Scheiner*, New Hampshire's tax system would satisfy the internal consistency test. No multiple taxation or discrimination results from hy-

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[17] In fact, any assumption that the owners of Seabrook own no other nuclear property would be inconsistent with the actual facts. For example, the Connecticut Yankee and Millstone 1-3 nuclear power plants are located in Connecticut; the Pilgrim plant is located in Massachusetts and the Vermont Yankee plant is located in Vermont. Stipulation ¶ 6.20. Seabrook owners have interests in these plants. In fact, CL&P has ownership interests in all four nuclear plants located in Connecticut. Stipulation ¶¶ 6.21, 6.22 and 6.25.

pothesizing the existence of New Hampshire's Nuclear Property Tax system in other states. The Final Report's conclusion that the system fails the internal consistency test is incorrect.

iii. Even The *Armco/Tyler Pipe* Version Of The Internal Consistency Test Fails To Support Plaintiffs' Position

As described at the beginning of this section, the most controversial application of the internal consistency test occurred in *Armco* and *Tyler Pipe*. The Final Report suggests that New Hampshire's tax system involves the same problem identified by the Court in *Armco* and that "without question" the system fails the internal consistency test. Final Report at 37. But the New Hampshire system bears no relation to the taxes invalidated in *Armco* or *Tyler Pipe* and the reasons the Court applied the internal consistency test in those cases do not exist here.

The tax system in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), was entirely different from the system Plaintiffs challenge in this case. In *Armco*, West Virginia imposed a gross receipts tax on persons engaged in the business of selling tangible property at wholesale. 467 U.S. at 640. However, West Virginia's wholesaling tax contained an exemption making the tax inapplicable to persons engaged in manufacturing in West Virginia. *Id.* Thus, by its terms, the tax applied to out-of-state manufacturers making wholesale sales in West Virginia, but not to in-state manufacturers making wholesale sales. This exemption made the wholesaling tax discriminatory on its face. Unlike in *Armco*, there is no exemption in New Hampshire's Nuclear Property Tax for New Hampshire utilities. All owners of Seabrook are subject to the tax and all of them pay it.

West Virginia's wholesaling tax discriminated on its face because, by its terms, it applied to out-of-state manufacturers,

but not to in-state manufacturers. There was no need to resort to the internal consistency test to identify the discrimination. The Court resorted to the internal consistency test only because West Virginia attempted to defend its facially discriminatory exemption by arguing that it compensated for the state's manufacturing tax on in-state manufacturers. West Virginia contended that in-state and out-of-state manufacturers each paid one or the other tax, but not both. It was in response to this argument that the internal consistency test was invoked.

Armco argued that it could be required to pay both taxes, because it might have to pay a manufacturing tax in its own state, while it would still be liable for the wholesaling tax in West Virginia. West Virginia responded that Armco should have to show that it would actually pay such a manufacturing tax. It was on this question that the Court disagreed and turned to the internal consistency test, hypothesizing the existence of West Virginia's tax system in every other state to determine if one or both taxes would be paid by a taxpayer in Armco's position. The Court concluded that if all states used the same system, Armco would pay a manufacturing tax in its own state, Ohio, and a wholesaling tax in West Virginia.[18] The manufacturing tax could not be a compensating tax because the internal consistency test demonstrated that Armco might have to pay it *and* the wholesaling tax.

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[18] Unlike the Special Master, in applying the internal consistency test in this case, the *Armco* Court did not have to assume — contrary to fact and logic — that Armco engaged in no wholesaling activity in any state other than West Virginia in order to apply the test and reach the conclusion that West Virginia's tax system failed it.

Consistent with *Armco*, if the internal consistency test is to be utilized in this case, it is logical to assume (as is the case, see footnote 17) that Seabrook owners both earn income and own nuclear property in their home states.

Armco's internal consistency test has no application in this case. New Hampshire has not exempted in-state companies from any tax. It is not arguing that some other tax constitutes a compensating tax for that exemption. It is collecting a property tax from every owner of Seabrook in direct proportion to its ownership interest in Seabrook. It is not collecting business profits taxes from any of them. And if it ever collects excess business profits taxes, it will collect them only from the owners doing the most business and earning the most profits properly apportioned to New Hampshire. There is no discrimination or multiple taxation of the type identified in *Armco*.

The same distinctions apply to *Tyler Pipe Indus., Inc. v. Washington*, 483 U.S. 232 (1987), "implicitly applying" the internal consistency test. *Tyler Pipe* involved a Washington tax which, like the West Virginia tax in *Armco*, contained an exemption, the availability of which turned on whether sales were made in interstate commerce or intrastate commerce. The Court stated that the tax had "the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*." *Id.* at 240. As in *Armco*, Washington sought to justify its exemption under the compensatory tax doctrine. *Id.* at 242. And, as in *Armco*, the Court rejected the compensatory tax defense, citing the *Armco* discussion of the internal consistency test. The facts and holding of *Tyler Pipe* are just as inapposite to this case as those in *Armco*.

iv. The Special Master's Effort To Modify The Internal Consistency Test And Extend Its Application Is Unsupported By Any Case

The Final Report's remaining reason for concluding that New Hampshire's system fails the internal consistency test is equally flawed. The Special Master adopts a new version of the test under which a state's tax system is invalid if it "creates an incentive to shift business activities into the state." Final Report at 38. In other words, the Special Master would hold that any tax system that exerts "hydraulic pressure" fails the internal consistency test.[19] This new statement of the test is unsupported by any case and is not the measure of the validity of state tax systems.

It is well established that States may adopt tax systems that provide incentives to shift business activities into their state. The clearest example is that a state may choose not to impose an income tax. The result of such a decision is that companies doing all of their business within the state avoid any taxation of their income while companies doing some or all of their business in other states that impose income taxes do not. Such differing tax systems may provide incentives to shift business activities from one state to another, but they do not violate the internal consistency test. There is no Constitutional require-

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[19] When the "practical operation," *Maryland v. Louisiana*, 451 U.S. 725, 756 (1981), of New Hampshire's decision not to tax ordinary business profits is considered, the "hydraulic pressure" argument in this case becomes completely unrealistic. A plant location decision of a utility, for example, depends on a myriad of factors, including the comparative views of the utility regulatory commissions in the States involved as to rate increases, differing siting requirements, the comparative existing wage rates and union conditions in the States, economic conditions, personal income taxation, comparative housing costs, availability of water, roads, sewers, the general cultural ambience of the State and its resulting attractiveness to employees, and the like. For a remote utility, the availability and expense of transmission services would be an additional major consideration. The suggestion that a Connecticut utility serving Connecticut customers would decide to locate its plants in New Hampshire because New Hampshire does not tax ordinary business profits is not practical or consistent with the reality of actual operations. 451 U.S. at 756. Moreover, the suggestion that a Connecticut utility would locate personnel in New Hampshire to influence the calculation of state taxes is equally unrealistic. Finally, any implication that utilities can shift sales among states to suit tax planning ignores reality and restriction of franchise territories in this regulated industry.

ment that all states impose income taxes or that all states impose income taxes at the same rate.[39]

The Final Report's conclusion — that the Commerce Clause is violated if one Seabrook owner has a "heavier total tax burden" than another, Final Report at 38, because one owner pays two taxes (for example, a Nuclear Property Tax to New Hampshire and an income tax to, say, Connecticut) whereas another owner pays only one tax (a Nuclear Property Tax to New Hampshire) — is flawed and is not supported by the internal consistency cases. If a state does not impose income taxes but does impose property taxes, the result is that in-state owners of property pay one tax — a property tax — and out-of-state owners pay two taxes — a property tax and an income tax in their own state. There is nothing unconstitutional or internally inconsistent about such a system. It is the natural result of one state's decision to forego collection of taxes on income, which is precisely what New Hampshire has done in the statute challenged in this case. Indeed, under the theory advanced by the Plaintiffs, the constitutionality of this property tax is controlled by whether the State also has an income tax rather than by the actual effect on commerce of the *ad valorem* tax.

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[39] To support the finding that the New Hampshire tax system encourages the shifting of business into the State, the Special Master identifies the June 5, 1992 merger of PSNH and NU as doing "exactly what the Seabrook tax and credit scheme creates a strong incentive to do. . . ." Final Report at 32. In reaching that conclusion, the Special Master suggests that the merger was motivated by New Hampshire's tax system. The record demonstrates that the merger had nothing to do with the new tax system. The bankruptcy of PSNH occurred on January 28, 1988 and the confirmation by the Bankruptcy Court of a plan of reorganization took place on April 20, 1990. The confirmed plan required PSNH to merge with NU. Stipulation ¶ 3.6. The agreement for the merger of the companies was thus in place over a year before the Nuclear Property Tax was enacted. There is no basis for the Report to find any causal connection between the existence of the tax system and the merger.

Thus, a review of the few cases in which the Court has used the internal consistency test demonstrates that it provides no support for Plaintiffs' position in this case. Even the most controversial applications of the test, in *Armco* and *Tyler Pipe*, are of no assistance to Plaintiffs and do not support the conclusion reached by the Special Master. Instead, Plaintiffs' internal consistency argument is an effort to establish a new principle of constitutional law that the foregoing examples demonstrate cannot withstand analysis. In adopting the Plaintiffs' argument, the Special Master would have the Court create new law in order to invalidate the New Hampshire tax system. The New Hampshire system satisfies the internal consistency test and is valid on its face.

3. The Nuclear Property Tax Does Not Discriminate In Effect

The Final Report purports to apply settled principles from this Court's Commerce Clause decisions in concluding that the Nuclear Property Tax discriminates in actual effect. The Report states that New Hampshire's credit against the Business Profits Tax is "[l]ike the Louisiana first-use tax" at issue in *Maryland v. Louisiana*, 451 U.S. 725 (1981), and "plainly falls within the ambit" of the prohibition against certain impermissible credits described in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984). Final Report at 27-28. But the New Hampshire statute is unlike the laws addressed in those cases and citation of those decisions is no substitute for finding actual discrimination in this case.

The Final Report's conclusion that the Nuclear Property Tax discriminates in actual effect is contrary to the evidence. The facts set forth in part 1 of this section reveal that the Nuclear Property Tax has resulted in no discrimination against interstate commerce since it was enacted. Moreover, the historical

facts suggest that in the future the same conclusion will be reached — the New Hampshire system does not discriminate.

Because plaintiffs were unable to show discrimination based on actual facts, they contended that the effects of the tax should be measured by speculation about the future. Plaintiffs couched this speculation in the form of projections prepared by certain of the owners of Seabrook, but the effort to predict the future is necessarily uncertain and speculative. The utilities themselves acknowledged that their projections are based on assumptions about things that cannot be predicted with any certainty: "weather, economic conditions, fuel costs, competition from alternative sources of supply and other facts." Stipulation ¶8.1, 9.1, 14.1. When a tax has operated without discrimination, "proof" in the form of speculation about future events is an insufficient basis on which to declare a state tax unconstitutional.

The Special Master's Final Report highlights the absence of any proof of discrimination by relying, at every critical juncture, not on proof from the record, but on hypothetical examples. Final Report at 22-24, 29. To the extent that the Report refers to the record, it often contains references to the speculative projections, rather than to actual facts. Final Report at 29-33. And, whether the Report examines projections or actual facts, it adopts as its standard of comparison the "percentage of Seabrook Tax Credit utilized" — a measure which does not identify discrimination and is not a test of the constitutionality of New Hampshire's tax system.

The facts in the record demonstrate, and the Final Report acknowledges in part, that many factors which have nothing to do with the arguments in this case cause the "percentage of Seabrook tax credit utilized" to vary from owner to owner. The "percentage share of Seabrook owned" compared to the size of each owner's business and "the profitability in any given year of a Seabrook owner (or its unitary group)" primarily determine

the percentage of the credit that each owner is able to use. Final Report at 21. The conclusion that differences in the percentage of the credit useable by different owners demonstrates discrimination is clearly incorrect. Many credits provided by tax statutes go unused for many reasons. If every taxpayer had to be able to use the same percentage of every credit established by every tax statute in order to avoid a finding of discrimination, nearly every statute providing a credit would be discriminatory.

Thus, a comparison of percentages of credit utilized is not the measure of discrimination and the Special Master's effort to base a finding of discrimination on this test was error. The impropriety of the Special Master's test is particularly apparent in this case because, regardless of the percentage of credit that each owner will use in the years covered by Plaintiffs' projections, each owner has sufficient credits to eliminate entirely any obligation to pay New Hampshire business profits taxes.

i. The Final Report's Conclusion That Discrimination Exists In This Case Is Not Supported By The Cases Cited

Plaintiffs' challenge to New Hampshire's Nuclear Property Tax system relies extensively on the decision in *Maryland v. Louisiana*, 451 U.S. 725 (1981), and the Final Report reflects a similar reliance. A comparison of the Nuclear Property Tax system and the first use tax system in *Maryland* highlights the absence of the requisite showing of discrimination in this case.

In *Maryland v. Louisiana*, Louisiana imposed a "first use" tax on natural gas that was produced offshore on federal land and adopted tax credits and exemptions that were only available to local businesses. The Court stated that:

> A state tax must be assessed in light of its actual effect considered in conjunction with other provisions of the

> State's tax scheme .... In this case, the Louisiana First-Use Tax unquestionably discriminates against interstate commerce in favor of local interests as the necessary result of various tax credits and exclusions.

Id. at 756. As discussed in Section B (1), the evidence in this case establishes that discrimination is not "the necessary result" of the New Hampshire tax system. In fact, when the system is assessed in light of its actual effect, it is clear that no discrimination results.

In contrast, the discrimination in *Maryland v. Louisiana* was clear on the face of the statute.[21] For example, the Louisiana first use tax contained an exemption, making the tax completely inapplicable to the use of gas for drilling oil or gas within Louisiana. *Id.* at 733. No similar exemption was available for gas used to drill for oil or gas in other states. Unlike the Louisiana first use tax, the Nuclear Property Tax contains no exemptions, and certainly no exemptions available only to in-state interests.

Similarly, some taxpayers subject to the first use tax could claim a credit against other Louisiana taxes, but the credit was only available if the taxpayer was engaged in the business of extracting natural resources within Louisiana, *Id.* at 732, or was a municipal or Louisiana-regulated electric generating plant or natural gas distributing service located within Louisiana, *Id.* at 733. Thus, the interstate pipeline companies, which paid the majority of the first use tax, were completely unable to claim a credit. *Id.* at 758.

[21] The same was true of *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977), in which the statute provided for preferential tax treatment of nonresidents if they made their sales in New York, and *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963), in which the statute exempted from the measure of the State's sales tax labor or service costs incurred in manufacturing machinery in the State, but included such costs in the use tax if the manufacturing took place outside the State. Like the Louisiana first use tax, those taxes were discriminatory on their face.

Unlike these credits, the Nuclear Property Tax credit is available to all taxpayers. All of the out-of-state utilities owning interests in Seabrook have substantial property in New Hampshire and, under the state's three-factor apportionment formula, have significant income subject to the New Hampshire business profits tax.[22] In fact, some of these utilities, including the United Illuminating Company, New Haven, Connecticut; Montaup Electric Company, West Bridgewater, Massachusetts and Canal Electric Company, Cambridge, Massachusetts, have approximately 40 to 50% of their property in New Hampshire. Stipulation ¶¶ 7.7, 7.15, 7.21.

Because the Nuclear Property Tax credit is available to all owners of Seabrook, New Hampshire's system is entirely different from tax statutes that make exemptions or credits available only to in-state businesses, as in *Maryland v. Louisiana* or *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), or that allow out-of-state businesses a smaller credit because they do business in other states, as in *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 397 (1984). The Nuclear Property Tax

[22] Plaintiffs suggest that, unless electricity generated at Seabrook is "sold within the State" by an owner, there is no "business activity for purposes of the Business Profits Tax." Plaintiffs' Brief Before the Special Master at 48-49. They argue that owners making sales "outside New Hampshire" are not subject to the business profits tax and do not have a "tax basis against which to take a credit." *Id.* These contentions are incorrect because the ownership of property in New Hampshire by each of the owners constitutes business activity in the State for purposes of the business profits tax and, if the owners' sales of electricity within or outside New Hampshire generate profits, a portion of those profits will be allocated to and taxable by New Hampshire under its three-factor apportionment formula. Thus, contrary to Plaintiffs' assertion, all owners of Seabrook will have a "tax basis against which to take a credit." *Id.*

credit is made available to all owners of Seabrook on the same basis — their percentage ownership interest in nuclear station property. It does not matter whether the owners are engaged in interstate or intrastate commerce. Nor does it matter whether they do any other business in New Hampshire apart from owning an interest in Seabrook. This completely distinguishes the Nuclear Property Tax credit from the credit in *Westinghouse*, where the amount of credit a corporation could claim was "determined by reference to shipments of export property from a regular place of business in New York." Under New York's system in *Westinghouse*, in-state New York companies shipping $10,000,000 of products would receive a greater credit than out-of-state corporations shipping the same $10,000,000 of products, merely because the out-of-state corporation's shipping operations occurred partly from its own state and only partly from New York.

If the amount of the credit is determined in a way that does not discriminate against out-of-state businesses, nothing in *Westinghouse* would invalidate the state's tax system just because the credit may benefit one taxpayer more than another. The *Westinghouse* Court was careful to state that the allowance of a credit against a state income tax does not offend the Commerce Clause. 466 U.S. at 406 n.12. The Final Report quotes this statement, but fails to consider its implications. Final Report at 35 n. 25. The *Westinghouse* Court's opinion contains a lengthy discussion of the apportionment process, recognizing that it results in the allocation to New York of less income of an out-of-state than of an in-state corporation. But the Court nonetheless stated that the "provision of the credit" did not offend the Commerce Clause, even though the credit would be of value only in proportion to the taxpayer's liability for the tax against which the credit is allowed. The credit violated the Commerce Clause only because it was allowed on an impermissible basis that differentiated among taxpayers according to the location

from which they shipped exports. No such impermissible differentiation in the allowance of the credit exists in this case.

The Final Report's finding of discrimination is inconsistent with the reasoning of *Westinghouse*. The Final Report finds discrimination solely because New Hampshire provided a credit against an income tax — precisely the action that *Westinghouse* states does not offend the Commerce Clause. The Report identifies no respect in which New Hampshire's credit is allowed on an impermissible basis. It relies entirely on the conclusion that the credit will be more valuable to owners conducting more of their activities in New Hampshire. Final Report at 28.[23] Basing a finding of discrimination on this conclusion is plainly inconsistent with the *Westinghouse* Court's reasoning.

The Final Report fails to recognize or address the inconsistency between the recommended decision and the *Westinghouse* reasoning. Instead, the Report attempts to respond only to an observation made by New Hampshire in its brief that a large number of tax credits that have long been widely used by the states would be vulnerable if an income tax credit were held to be discriminatory merely because income tax liability

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[23] Indeed, the only discussion of the facts in the record is an illustration that the value of the Nuclear Property Tax credit against the business profits tax increases as an owner's liability for the New Hampshire business profits tax increases. Thus, when NU had $122,160 of New Hampshire business profits tax liability in 1991, the credit had a maximum value of $122,160 to it. If NU has a larger business profits tax liability in 1993 (which is impossible to predict), the value of its credit will be larger. Final Report at 29-33. The Court in *Westinghouse* understood this simplistic relationship between the value of a credit and the taxpayer's income tax liability, but did not hold that the provision of a credit against an income tax violates the Commerce Clause. Instead, it said just the opposite.

varies with the extent of business activity in a state.[24] Quoting the very language from *Westinghouse* that demonstrates the error in the Final Report's reasoning, the Report asserts that *Westinghouse* rejected the "parade of horribles" argument. Final Report at 35 n. 25. In fact, *Westinghouse* does not reject the argument at all. It establishes the principle on which New Hampshire relies — that provision of a credit against an income tax does not offend the Commerce Clause, even though such a credit is of value to taxpayers (assuming equal levels of profitability) in proportion to the amount of activity they conduct in a state.

[24] Among the state tax provisions that would be arguably unconstitutional would be the credit allowed by some states for the costs of research. A corporate income tax credit of 8% to 12% allowed by California for the cost of research is illustrative. Cal. Rev. & Tax Code 23609 (1991); P-H State & Local Tax Serv. ¶ 12,010.115. Assume that a manufacturing company based in Oregon owns a small plant in California, where it conducts only an insubstantial portion of its business. The company engages in research that costs it more than its California net income. If Plaintiffs' position were upheld, the Oregon company could challenge the constitutionality of the California credit provision on the ground that it is likely to obtain less proportionate credit for research than California based corporations that do most of their business in that state.

California also grants a credit of 10% of the cost of a solar energy system that is installed in premises in the state used for commercial purposes. The credit is allowed against the California corporate franchise and income tax. Cal. Rev. and Tax Code 23601.5 (1990); P-H Cal. State & Local Taxes ¶ 12,220.500. If Plaintiffs' premise were sound, an out-of-state based corporation that installs a solar energy system in California, where it carries on only a small fraction of its business, could contend that the credit provision violates the Commerce Clause on the ground that it would be likely to obtain only *de minimis* tax reduction from the credit, whereas, in-state corporations that carry on a large part of their business in the state are likely to obtain substantially larger tax reductions from the solar energy system credit.

Plaintiffs' position, if upheld, would also arguably invalidate the corporate income tax credits granted by many states for the employment of workers in an "enterprise zone," *see* Ill. Income Tax Act, Ill. Rev. Stat. ch. 120, par. 2-201(G) (1991); P-H State & Local Tax Serv. ¶ 2.010.115; and credits such as the Virginia credit of 10% of the cost of machinery and equipment used at fixed plants in the state for processing recycled personal property. Va. Code Ann. 58.1-445.1; P-H Va. State & Local Taxes, ¶ 12,733. The far-reaching impact that the contention being made in this case would have on a large number of existing state tax credits emphasizes the importance of the Court's adhering to its decision in *Westinghouse* and the other Commerce Clause decisions, none of which casts doubt on the validity of a credit such as the Nuclear Property Tax credit.

Finally, it is important to note that the purpose of the Nuclear Property Tax credit and the way that it functions are entirely different from the credits addressed in the cases cited in the Final Report. The credit was merely a convenient method to eliminate the business profits tax as applied to Seabrook's owners and to retain only an excess profits tax — a method that fit within the structure of New Hampshire's existing tax statutes. According to Plaintiffs' projections, the excess profits tax will not come into effect in the foreseeable future, if at all. What is left is a property tax paid by all Seabrook owners and a nondiscriminatory excess business profits tax that, if it is ever paid, will be paid by the owners who do the most business in New Hampshire, not the least.

ii. The Facts Do Not Support A Finding of Discrimination

The evidence in the record demonstrates that there has been no discrimination in effect. New Hampshire is collecting a property tax and nothing more. Collection of a property tax at the same rate from all owners of nuclear property is not discriminatory.

Plaintiffs' entire argument and the Final Report's recommendation are based on the assumption that a state's decision not to impose an income tax is discriminatory if imposition of the tax would have generated more revenue from some taxpayers than

from others. There is no authority under the Commerce Clause to declare a tax system invalid when the taxes actually imposed do not discriminate.

But even applying Plaintiffs' theory — adopted by the Special Master — that the Commerce Clause evaluates the effect of not imposing a tax, rather than the effect of the tax imposed, the same conclusion would be reached. Plaintiffs have not demonstrated discrimination under their theory. Because the out-of-state utilities owning Seabrook do business in New Hampshire, they have historically — and will have, as projected by Plaintiffs — substantial business profits tax liability and they will be the principal beneficiaries of New Hampshire's decision not to impose a tax on business profits. In fact, the substantial profits of these out-of-state utilities, as compared to the losses of the New Hampshire owners, means that the failure to tax business profits since the Nuclear Property Tax was enacted has been more meaningful for interstate than for in-state utilities. Stipulation ¶¶ 17.1, 18.1.

For example, the United Illuminating Company earned $55,550,000 in 1991; the much smaller Canal Electric Company earned $18,978,000; CL&P earned $240,818,000 and New England Power Company earned $134,747,000. Stipulation ¶ 18.1. The substantial earnings history and capacity of these utilities, together with their presence in New Hampshire (subjecting a significant portion of their incomes to the business profits tax) makes them the major beneficiaries of the Nuclear Property Tax credit. Since the Nuclear Property Tax was enacted, these out-of-state utilities are the only Seabrook owners who have filed business profits tax returns claiming a Nuclear Property Tax credit. To date, they have been the sole beneficiaries of the credit. And yet each of these companies has intervened in this action, contending that the credit discriminates against them because they are engaged in interstate commerce and even their speculative projections do not establish discrimination in favor of in-state utilities.

The absence of any proof of discrimination in actual effect is highlighted by a comparison between the assertions Plaintiffs made when they sought leave to file this case and the evidence that was introduced through the Stipulation of the Parties. Plaintiffs' assertion at the time this case was filed and thereafter was that "it is clear" that only one utility, PSNH, will benefit from the decision not to tax business profits. Plaintiffs' Brief in Support of Motion For Leave To File Complaint at 9 n.4. This assertion has been shown to be false. PSNH has had nothing but losses for the last five years. It lost more than $100 million in 1990 alone. Stipulation ¶ 17.1. Given the company's record of losses, the suggestion that it is earning business profits and incurring business profits tax liability is clearly wrong. PSNH paid no business profits taxes in 1991 or in any of the five years before 1991. Stipulation ¶¶ 7.46, 17.1. Because it has had no business profits tax liability, PSNH would not have benefitted from a decision not to tax business profits if it had been made in the past. Nor did it benefit after the statute was enacted. Stipulation ¶ 7.46.

The two other New Hampshire corporations owning interests in Seabrook likewise have had no business profits tax liability. EUA Power Corporation, like PSNH, has had a record of losses for years. Stipulation ¶ 17.1. It has been forced to sell its share of electricity generated at Seabrook at prices that do not cover its costs, let alone provide any opportunity for a profit and it is unsure "when, if ever" it will be able to obtain a long-term purchased power contract that might improve it financial position. Stipulation ¶¶ 14.2- 14.3. The New Hampshire Co-op — PSNH's largest customer and itself a 2.2% owner of Seabrook — is not subject to the Business Profits Tax and could not be a beneficiary of the credit. Moreover, the New Hampshire Co-op lost nearly $5 million in 1990 and, without any income, would not have a business profits tax liability, even if it were subject to the tax. Stipulation ¶ 17.1.

Thus, when the facts are examined, it becomes clear that the decision not to tax the business profits of any of Seabrook's owners has been of more benefit to the utilities engaging in interstate commerce than to the intrastate owners. Because the interstate utilities have benefitted from the credit they are challenging, their customers also benefitted. Thus, as the Final Report acknowledges, consumers of electricity in the Plaintiff States have not been the victims of preferential treatment accorded to utilities serving New Hampshire consumers. The Final Report concedes that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in Plaintiff States." Final Report at 16. Faced with this undisputed evidence, it is difficult to understand how the Special Master could have concluded that New Hampshire's Nuclear Property Tax system discriminated in actual effect. The conclusion is unsupported by any evidence and was incorrect.

C. 15 U.S.C. § 391 Does Not Apply To The Nuclear Property Tax (Recommendation B)

1. The Nuclear Property Tax Is Not A Tax On Or With Respect To The Generation Or Transmission Of Electricity

Plaintiffs alleged and the Special Master concluded that the Nuclear Property Tax discriminates against out-of-state manufacturers, producers, wholesalers, retailers, or consumers of electricity in violation of 15 U.S.. § 391. The Final Report correctly notes that New Hampshire has raised the threshold question whether Plaintiffs Section 391 complaint states a claim because Section 391 applies only to a "tax on or with respect to the generation or transmission of electricity,"[25] and the Nuclear Property Tax is not such a tax. The Special Master acknowledged the split in authority concerning the reach of Section 391 (Final Report at 18 n 10), but adopted the broadest possible interpretation of the statute, concluding that it extended so far as to include ordinary property taxes. The Special Master's construction of Section 391 was overbroad and inconsistent with the language and purpose of the statute.

The scope of Section 391 is obvious from a review of its language, its legislative history and the few cases interpreting and applying it. The Final Report's conclusion that an *ad valorem* tax on nuclear station property is a tax "on or with respect to the generation or transmission of electricity" is simply incorrect.

The best indications of the scope of the statute are the clear statements about the reason for its enactment. The statute was enacted specifically to invalidate a New Mexico law. *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 143, 147-48 (1979). The New Mexico tax was not simply a tax on someone engaged in the business of generating or transmitting electricity. It was a tax measured by the volume of electricity *generated* in New Mexico — at the rate of $.0004 per kilowatt hour.

This Court's discussion of Section 391 in *Arizona Pub. Serv. Co. v. Snead* underscores the narrow focus of the law — a particular state statute which imposed a tax measured by the generation of electricity. Indeed, the Court quoted the legislative history which referred to one unnamed state, noted that the tax was "concededly a tax on the generation of electricity," 441

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[25] Section 391 provides:
No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity.

U.S. at 149, and quoted the Senate floor debate, in which "Senator Cranston of California made it clear that the provision was aimed directly at New Mexico's electrical energy tax." *Id.* at 147. The legislative history of 15 U.S.C. 391 thus left no question that the New Mexico statute imposed a tax falling within 15 U.S.C. 391. A subsequent decision considering Section 391 observed that, in *Arizona Pub. Serv. Co. v. Snead*, "the Supreme Court had before it a legislative enactment directed at a state statute that Congress had declared to be discriminatory." *Duquesne Light Co. v. State Tax Dep't*, 327 S.E.2d 683, 685 (W. Va. 1984), *cert. denied*, 471 U.S. 1029 (1985).

On the other hand, Section 391 was not intended to apply to property taxes, such as the Nuclear Property Tax. The Nuclear Property Tax is not a tax on the "generation or transmission of electricity." It is a tax on nuclear property, assessed as a percentage of the valuation of the property. The differences between a tax on the generation of electricity and a property tax are apparent. While receipts from a tax on generation or transmission vary with the output of a generation facility or the use of a transmission line, receipts from a property tax are fixed by the property's value. Property tax liability continues to accrue even when a nuclear reactor is out of service, for example, for refueling. Stipulation ¶¶ 3.20-3.21. A tax on generation or transmission of electricity would produce no revenue when operations were suspended.

Plaintiffs argued that, even if the Nuclear Property Tax is not a tax "on" the generation or transmission of electricity, it is a tax "on or with respect to" generation or transmission, citing cases dealing with the meaning of the phrases "relate to" and "relating to." Plaintiffs' Brief at 44. The Final Report cites the Random House Dictionary for the proposition that the phrase "with respect to" encompasses any tax having a "relation or reference" to generation or transmission. Final Report at 18. But neither Plaintiffs nor the Special Master cited any cases supporting this expansive view of the phrase "with respect to"

and the few cases dealing with the phrase indicate that it is much narrower than Plaintiffs contend or the Final Report suggests. For example, in *Henshel v. Guilden*, 300 F. Supp. 470, 472 (S.D.N.Y. 1969), the court interpreted the phrase "with respect to" in 28 U.S.C. § 2201 (1958) narrowly. It concluded that, even though a federal tax assessment was a material element of a declaratory judgment case, the case was not one seeking a judgment "with respect to Federal taxes," and an exception in Section 2201 was therefore not applicable. A similar issue and result are presented by *King v. United States*, 390 F.2d 894, 914 (Ct. Cl. 1968), *rev'd on other grounds*, 395 U.S. 1 (1969).

Moreover, there are no cases holding that Section 391 applies to a property tax just because the property is an electrical generating plant. Only two cases discuss the scope of the statute's application. In the most closely analogous case considering the meaning of a tax "on or with respect to the generation or transmission of electricity," *Pacific Power & Light Co. v. Montana Dep't of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), the Montana Supreme Court concluded that Section 391 did not apply to a beneficial use tax on the owners of electrical generating plants for their use of electrical transmission lines having 500 kilovolt or greater ratings. The Court stated:

> [T]his tax falls neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities. As such, this tax does not violate 15 U.S.C. § 391.

773 P.2d at 1185. The Final Report relies on the other decision dealing with the scope of the statute — *Nevada v. City of Burbank*, 100 Nev. 598, 691 P.2d 845, 847 (1984), in which the court applied Section 391 to a tax on "the value of any right to receive electric power." But even if the Nevada decision correctly interprets Section 391, a tax on the value of the right to receive electricity is clearly more similar to a tax on the generation or transmission of electricity than is an ordinary property tax.

The Nuclear Property Tax, like the beneficial use tax in *Pacific Power & Light*, is not a tax upon generation or transmission of electrical power.[38]

Not only does the language of the Nuclear Property Tax provide that it is a tax on property rather than on the generation or transmission of electrical power, but the facts in the record establish that the operation of the tax since it was enacted has been completely different than and inconsistent with the operation of a tax on or with respect to the generation or transmission of electricity. The Seabrook plant began operating in 1990. Between June 1, 1990 and December 31, 1991 alone, it experienced 18 short-term unscheduled outages or outage extensions and 7 reductions of power. Stipulation ¶ 3.19. Yet despite the outages and power reductions, the Nuclear Property Tax was assessed and paid throughout this period. Stipulation ¶ 3.21. On July 25, 1991, the plant ceased operation entirely for refueling and maintenance and was not returned to service until October 16, 1991. Stipulation ¶ 3.20. Thus, the plant was idle, generating no electricity for more than two months. Nonetheless, the Nuclear Property Tax was assessed and paid without change. Stipulation ¶ 3.21. As recently as September 7, 1992, the plant again ceased operating, but the Nuclear Property Tax continues to accrue at the same rate. Stipulation ¶¶ 3.20-3.21.

Plaintiffs' contention that the Nuclear Property Tax is "in effect" a tax on generation or transmission "notwithstanding that the tax takes the form of a tax on property" is without substance. The plain terms of the statute, *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989)("Interpretation of a statute must begin with the statute's language"), *United States*

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[38] Indeed, unlike the tax in *Pacific Power & Light*, the Nuclear Property Tax by its terms does not apply to transmission lines, which were expressly excluded from the definition of Nuclear Station Property subject to the tax. Stipulation ¶ 3.1.

v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41 (1989) (when "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms'"), and the facts concerning its operation establish that it is not governed by 15 U.S.C. § 391. As the Court stated in *Arizona Pub. Serv. Co. v. Snead*, "[t]o look narrowly to the type of tax the federal statute names . . . is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it." 441 U.S. at 149-50. Section 391 simply does not apply to the Nuclear Property Tax.

2. The Nuclear Property Tax Does Not Discriminate Under § 391

Even if Section 391 were applicable, the Special Master's finding that "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in the Plaintiff States" (Final Report at 16) establishes that New Hampshire's tax does not violate the statute. Section 391 only prohibits a tax on the generation or transmission of electricity if it "results . . . in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." 15 U.S.C. § 391. The evidence established and the Special Master agreed that there is no greater tax burden on electricity transmitted to utilities and customers in the Plaintiff States than on electricity transmitted to intrastate utilities and their New Hampshire customers. That critical fact, which is not in dispute, makes the Final Report's conclusion that Section 391 has been violated clear error. If consumers of electricity in the Plaintiff States are not paying more than consumers in New Hampshire, the New Hampshire statute does not impose a "greater burden" on electricity sold to them.

In contrast to the New Hampshire statute, the New Mexico statute which was the subject of *Snead* clearly imposed a

greater burden on electricity generated and transmitted in interstate commerce than on electricity generated and transmitted in intrastate commerce. Senator Fannin, who introduced Section 391 specifically to overturn the New Mexico statute, noted that:

> New Mexico's electrical energy tax is imposed entirely on out-of-State consumers of electricity generated in New Mexico.

Hearing on S. 1957 Before The Subcomm. on Energy of the Senate Comm. on Finance, 94th Cong., 2d Sess. (March 8, 1976), at 5. Senator Goldwater made similar observations about the discriminatory effect of the statute:

> The end result of the legislation is to tax all electricity generated in New Mexico which moves in interstate commerce and is consumed outside New Mexico and then, Mr. President, to exempt from the generating tax all of the electricity generated and consumed in New Mexico.

122 Cong. Rec. 24328 (July 28, 1976).[17]

The Special Master overlooked this critical difference between the effects of New Hampshire's tax system and the kinds of taxes to which Section 391 was addressed and concluded that the New Hampshire tax system "replicates the flaw" identified by the *Snead* Court in the New Mexico statute. Final Report at 20. But the fact that the New Mexico and the New Hampshire taxes both involved credits is no substitute for analysis of the purpose and effect of the credits, which are entirely different.

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[17] Plaintiffs contended that the New Hampshire nuclear property tax system had the same effect. The Special Master found that it did not because "customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in Plaintiff States." Final Report at 16.

In contrast to the Nuclear Property Tax credit, New Mexico's tax on the generation of electricity provided a credit that was only available to in-state interests:

> Mr. Sargent . . . . New Mexico provides that the companies that do business in the State of New Mexico selling to customers there can take a credit against the New Mexico gross receipts tax the amount paid in the New Mexico generation tax. The net effect is they don't pay the New Mexico generating tax.
>
> Senator Fannin . . . . This procedure is not available, of course, to the Arizona users or people outside the State of New Mexico?
>
> Mr. Sargent . . . . That is correct. It is not.

Hearing on S. 1957, supra, at 10.

When this Court ultimately considered the New Mexico statute in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), it highlighted the unavailability of the tax credit to out-of-state interests. The Court stated that the statute allowed a tax credit only for "electricity generated inside [New Mexico] and consumed in this state." *Id.* at 143 n.4. Accordingly, the "tax-credit provisions . . . insure[d] that locally consumed electricity is subject to no tax burden . . . while [interstate electricity] . . . is subject to a 2% tax, since it is sold outside the State." *Id.* at 149 (emphasis in original).

The Final Report does not reflect any consideration of these important differences. Instead, it responds only to New Hampshire's observation about the clearly impermissible effects of the New Mexico credit. Final Report at 21. The New Mexico credit was certain to provide a dollar for dollar benefit to the favored local interests in every case because, in effect, both the 2% electrical generation tax and the 4% gross receipts tax to

which the credit applied were both measured by the same thing — gross receipts in New Mexico. The Final Report notes this difference, but dismisses it with the suggestion that it relates only to the "extent" of discrimination. Final Report at 21. When the Report had already found that, in this case, there is no greater tax burden on electricity transmitted in interstate commerce than on electricity transmitted in intrastate commerce, the unexplained suggestion that "discrimination" within the meaning of Section 391 still exists to some "extent" is clear error. The recommendation that the Court reach such a conclusion in the face of a directly contrary factual finding by the Special Master should be rejected.

D. The Final Report's Recommendation On Remedy Denies New Hampshire Basic Rights Afforded All States (Recommendation D)

Even if all of the substantive conclusions in the Final Report were correct, at most the Special Master has identified a minor defect in New Hampshire's statute. The draconian remedy the Report recommends denies New Hampshire basic rights established by the decisions of this Court. New Hampshire is entitled to those rights and the proposed remedy should be rejected.

The Report acknowledges that, when a state tax is found to violate a constitutional or statutory requirement, this Court has tended "to allow States the initial chance to correct the offending tax system." Final Report at 42. If New Hampshire's credit against the business profits tax offends the Constitution, the credit is easily eliminated (as is the nonseverability clause). The result would be collection of $1,470,620 of business profits taxes from the four out-of-state owners who claimed the credit on their 1991 business profits tax returns and, when 1992 returns are filed, collection of whatever business profits taxes are due from Seabrook owners, without allowing the credit.

Despite the ease with which any defect in New Hampshire's statute could be corrected and the Special Master's recognition that this Court's decisions provide for states to effect such corrections, the Final Report recommends that New Hampshire be denied its opportunity to remedy the defect. Instead, the Report recommends that New Hampshire be required to refund all of its property tax receipts since the statute was enacted. If this Court were to accept this conclusion, New Hampshire's $1.4 million error in favor of the out-of-state owners of Seabrook would cause it to forfeit more than $33 million of property tax revenue that the Final Report makes clear New Hampshire had the right to collect. The decisions of this Court require no such result.

1. No Refund Is Available Because Retroactive Relief Is Inappropriate

The Special Master recognized that, before the Court even considered a refund remedy, it would have to address the fundamental question whether a decision invalidating some aspect of the Nuclear Property Tax should be applied retroactively or prospectively. In *Chevron Oil Co v. Huson*, 404 U.S. 97 (1971), the Court described the circumstances under which a decision should be applied prospectively only. Although the Final Report notes that the continued viability of *Chevron's* analysis "may be in doubt," Final Report at 39, *Chevron* has not been overruled and its reasoning applied here. The first factor under *Chevron* in deciding whether a decision should be applied prospectively only is that:

> . . . the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear

> past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

404 U.S. at 106 (citations omitted).

New Hampshire's brief before the Special Master pointed out that no case has been cited by Plaintiffs that supports their contention that the New Hampshire Nuclear Property Tax, coupled with the credit against the business profits tax, is discriminatory against interstate commerce. It noted that any such decision would be announcing a new rule of law, inconsistent with *Commonwealth Edison Co. v. Montana*, 453 U.S. at 618 (1981), which noted that a property tax "has never been doubted as a legitimate means of raising revenue by the situs State . . . ." *Id.* at 624, and *Westinghouse*, 406 U.S. at 406 n.12, which indicated that the provision of a credit against an income tax does not violate the Commerce Clause. The Final Report concedes that a ruling against New Hampshire "apparently would for the first time" invalidate a system such as New Hampshire's. Final Report at 40. Nonetheless, the Report concludes that it "should have been apparent to New Hampshire that its Seabrook Tax and credit scheme was of dubious constitutionality." Final Report at 41. Based on this characterization of the law and the Special Master's view that New Hampshire had "no legitimate reliance expectation," the Final Report recommends that the decision be enforced retroactively with the result that New Hampshire forfeits all of the property tax revenue collected to date.

Even if the Final Report's conclusion that New Hampshire's tax system is invalid is correct, at the very least it represents a decision on an issue of first impression whose resolution was not clearly foreshadowed. Under these circumstances, the relief to be granted to Plaintiffs should be prospective only. This

conclusion is supported by Justice O'Connor's opinion in *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 181 (1990), which observes that:

> [T]he threshold determination whether a new decision should apply retroactively is a crucial one, requiring a hard look at whether retroactive application would be unjust.

Retroactive application of a decision invalidating the Nuclear Property Tax would be unjust under the standards applied in *Smith* and *Chevron*. New Hampshire was entitled to rely on established precedent upholding property taxes and on the absence of any decision invalidating a nondiscriminatory income tax credit. Unlike the tax challenged in *McKesson*, the Nuclear Property Tax system is not "virtually identical" to a tax scheme invalidated by the Court in a recent decision. To the contrary, the most that Plaintiffs could contend if they prevail in this case is that they have pursued "an issue of first impression whose resolution was not clearly foreshadowed." *Chevron*, 404 U.S. at 106.[28]

Justice O'Connor's opinion in *Smith* stresses "the inequity of unsettling actions taken in reliance on" established precedents. 496 U.S. at 182. New Hampshire's past collection of property tax payments from the Seabrook owners is just such an action that it would be inequitable to disturb. As in *Smith*, "[a] refund . . . could deplete the state treasury, thus threatening the State's current operations and future plans." *Id.* The injustice of a refund here is even clearer because it would result in a windfall to Seabrook's owners who have not been injured by the

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[28] No prior decision has considered and resolved the issue in this case retroactively and there is therefore no issue of selective prospectivity of the type presented in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991).

aspects of the New Hampshire system they challenge. For all of these reasons, it is clear that, if relief is granted in this case, it should be prospective only. The Special Master's recommendation to the contrary should be rejected.

2. No Refund Is Available Under The *McKesson* Decision

If Plaintiffs prevail in this case, they are entitled to a declaration that the New Hampshire system has whatever Constitutional or statutory deficiencies the Court identifies. Admittedly, the nonseverability clause contained in the enabling legislation, H.B. 64, Chapter 364:19, prevents the Court from invalidating one aspect of the system — for example, the business profits tax credit — while upholding and enforcing the property tax. If either aspect of the system is invalidated, the New Hampshire legislature has determined that it must consider the entire system anew and, absent further legislative action, has chosen not to enforce the valid aspect of the system in the future.

But these propositions do not support the conclusion that, if Plaintiffs prevail in this case, all property tax payments received by New Hampshire in the past must be refunded. In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Court considered whether a tax refund was an appropriate remedy in a case in which a Florida excise tax was successfully challenged under the Commerce Clause for providing preferential treatment for beverages made from local agricultural crops. The tax had been adopted by Florida after the Court invalidated a similar preference scheme employed by the State of Hawaii. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). Observing that, after *Bacchus*, Florida could not claim surprise that its virtually identical tax was declared invalid, 496 U.S. at 50, the Court rejected Florida's arguments that only prospective relief was appropriate. The Court

concluded that "meaningful backward-looking relief" was available as a remedy for Florida's invalid tax, but held that the remedy need only cure the discriminatory aspect of the tax. In other words, the remedy should redress the injury, but should not confer a windfall by refunding all taxes paid under the statute.

The Court described the range of options available to a state after a tax statute has been declared invalid and it has been concluded that prospective relief alone is not adequate:

> [A] State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause . . . .

496 U.S. at 40.

Under *McKesson*, if the Court were to accept Plaintiffs' argument that the Nuclear Property Tax credit against the business profits tax makes New Hampshire's entire system invalid and that prospective relief alone is not a sufficient remedy, New Hampshire's obligations with respect to the past application of the system — during the "contested period" — would depend on the effects of the system during that period. If no actual discrimination resulted during the contested period, no action is necessary to "cure the invalidity" of the system during that period.

The record demonstrates that there has been no actual discrimination against Plaintiffs. Utilities engaged in interstate commerce have been the principal beneficiaries of the Nuclear Property Tax credit that Plaintiffs challenge. The benefit they received is the difference between the tax they paid and the tax

they would have paid in 1991 if the system had not included the credit. That difference is $1,470,620 and represents the amount of business profits tax Intervenors would have owed to New Hampshire *in addition to* the property tax payments they have already made. Stipulation ¶¶ 7.10, 7.15, 7.33, 7.40. In other words, the "cure" for whatever differential impact the credit against the business profits tax had in 1991 is not a refund by New Hampshire — it is a payment of additional taxes by certain of the Intervenors. When tax returns are filed for 1992, it is possible that an even larger payment of additional taxes would be needed to cure the advantage the interstate utilities enjoyed. Stipulation ¶¶ 8.5, 8.7, 8.13, 8.23.

The Special Master recommends that New Hampshire be denied its right to cure whatever discrimination occurred during the contested period. The first reason given for this recommendation is that there is no State Court to which this case could be remanded. Final Report at 43. But the right granted in *McKesson* is not a right to a remand; it is the right to effect a cure of a tax statute after a finding of discrimination. The right to effect a cure has nothing to do with whether a court is available on remand to supervise the State's accomplishment of a cure.[29] Here, where there is no State Court to which the case could be remanded, this Court, with the assistance of the Special Master, can and should oversee the correction of any defect in the statute.

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[29] Under the approach recommended by the Special Master, New Hampshire would be denied the rights accorded all other states, simply because the Plaintiffs chose to challenge the tax in an original action before this Court. Had the utilities proceeded through the state administrative and judicial system — an option expressly provided by RSA 83-D:10-11, and not prevailed, this matter would be before the Court on *certiorari*. Under those circumstances,the matter could be remanded to the state court to supervise New Hampshire's effort to cure whatever defect in the statute is identified by the Court.

The second reason given for denying New Hampshire the right it requested to be allowed time to effect a cure of any constitutional defect in the statute is that "New Hampshire shut its own door on the *McKesson* invitation" to effect a cure. Final Report at 43. But New Hampshire did no such thing. The only evidence the Final Report cites for this waiver by New Hampshire of a $33 million right is its statement in the non-severability clause that, if the credit is invalid, the property tax also "shall be invalid." The Special Master takes this legislative statement — phrased in the future tense — as if it were an election to refund all tax revenue collected in the past, even when *McKesson* does not require such a refund. But the non-severability clause does not address the past at all. It is merely a statement of New Hampshire's intent prospectively to reformulate the tax system if a portion of it is declared to be invalid. It certainly is not an election to waive the *McKesson* right to cure a minor defect and to forfeit $33 million of valid property tax revenue. To leave no doubt on the question, New Hampshire hereby advises the Court that it wishes to exercise its right under *McKesson* to effect a cure of any defect that may be found in its statute. This being so, the Final Report's recommendation that New Hampshire be denied its rights under *McKesson* should be rejected.

3. No Refund Is Available Because The Eleventh Amendment Bars a Refund

In addition to the matters discussed in *Chevron*, *Smith* and *McKesson*, a judgment ordering New Hampshire to pay a tax refund to Intervenors would violate the Eleventh Amendment, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state. . . ." While the Special Master is correct that the Eleventh Amendment has been held not to bar original actions, including actions for money judgments,

brought by states, *Maryland v. Louisiana*, 451 U.S. at 745 n.21; *Texas v. New Mexico*, 482 U.S. 124, 130 (1987), it does not authorize monetary recoveries by specific individuals on behalf of whom the state may be proceeding. 451 U.S. at 745 n.21. Thus, the Court stated in *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258-59 n.12 (1972), "[a]n action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals."[20]

The record establishes and the Special Master concedes that consumers in the Plaintiff States have not borne a greater burden of Nuclear Tax Payments than consumers in New Hampshire. Therefore, the Plaintiff States cannot be suing to redress discrimination against themselves or their citizens because none has occurred.

The Final Report attempts to avoid this conclusion by stating that, although any refund would be paid to the utilities owning interests in Seabrook, the "[r]efund to the taxpayers (the 12 Seabrook owners) is merely the mechanism through which the states seek to be made whole." Final Report at 41. That conclusion is without support in the record and, thus, the Report is in error.

The Final Report looks to *Maryland v. Louisiana* to support the conclusion that the Eleventh Amendment bar is not applicable, but that reliance is misplaced. In *Maryland v. Louisiana*, consumers in the Plaintiff States had paid the first use tax and a mechanism existed to perfect refunds. When permitting the pass-through of the challenged tax, the Federal Energy

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[20] There can be no question that Connecticut sued on behalf of its utilities because, before January 19, 1993, no Connecticut consumers, including the State government, will pay any Nuclear Property Tax. Stipulation ¶¶ 5.23, 5.24.

Regulatory Commission ("FERC") had expressly provided a refund obligation and mechanism for refund in the event that the tax was invalidated. In this case, the taxpayers sought and received permission from state and federal regulators to include the Nuclear Property Tax in rates in the future. Although the authorizations to include the tax in rates were granted by the Plaintiff States and the FERC, and such grants were after the filing of the complaint in October 1991,[21] none of the regulatory approvals addressed the constitutionality of the tax or provided for a refund if the tax were invalidated.[22] Likewise, there is nothing in the record that would provide a separate mechanism for a refund to the customers of the taxpayers. Thus, there is nothing in the record from which to conclude that a refund would be made to anyone other than the 12 taxpayers for whom the states brought this suit and there is no support for the conclusion of the Special Master that the 12 utilities would act as a conduit in the event of a refund requirement.

In addition to the fallacious assumption that the utilities are merely a conduit to consumers, the Final Report errs in assuming that, if a refund were ordered, all the taxes previously paid by intervenors would flow through to consumers. This assumption is disproved by the record. Nearly half of the Nuclear Property Tax payments have not been included in rates to consumers, and never will be. This is so because the utilities chose to forego complete recovery of the tax. Stipulation ¶¶ 5.9-5.25. In the case of CL&P, for example, the tax has yet to be collected from customers in Connecticut. Stipulation ¶ 5.24. Another joint owner, EUA Power is in bankruptcy and continues to sell its Seabrook power below the cost of production, so it

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[21] The only exception is Canal, which began including the tax in rates before the Complaint was filed. Stipulation in ¶¶ 5.6-5.8.

[22] Two joint owners in the Plaintiff States are not subject to regulation: Hudson and Taunton Municipal Light. Stipulation ¶¶ 5.22, 5.21.

cannot be determined with certainty how much, if any, Nuclear Property Tax has been included in rates to its customers. Stipulation ¶ 5.31.

The tax not paid by the consumers was paid by the utilities' shareholders. With respect to that portion of the tax — nearly half — there is nothing to refund to the customers of the utilities. Moreover, the Plaintiff States have no ability to obtain, and presumably no interest in pursuing, refunds in New Hampshire and Vermont, the home states of utilities owning more than 50% of Seabrook. If the Special Master had considered the amount of any refund that would be received by citizens in the Plaintiff States, he would have found that only about 27% of the tax collected could, in fact, be refunded. In view of the actual amount that would reach the citizens of the Plaintiff States, the Special Master's cursory dismissal of the Eleventh Amendment bar should not be adopted by the Court. Rather, in accordance with the Eleventh Amendment, the Court should not permit the utilities to sue a state in federal court by joining an action commenced by states.

The critical point is that, any claim for a refund in this case is, to a very large extent, a claim by the Intervening Utilities themselves, not a claim by the Plaintiff States or their consumers. The Intervening Utilities may not avoid the Eleventh Amendment bar to recovery of a tax refund that would apply to any action they brought in federal court by themselves. *See Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945). Their rights as intervenors clearly cannot exceed the rights they would have if they had been entitled to maintain an action in this Court in their own names. *See Arizona v. California*, 460 U.S. 605, 613-614 (1983) (permitting intervention of Indian Tribes in water rights dispute but noting that the Tribes merely sought to participate in the proceeding, not to bring

new claims or issues and that therefore "the States' sovereign immunity protected by the Eleventh Amendment is not compromised").

Intervenors have cited no statute, including 15 U.S.C. § 391, purporting to limit New Hampshire's Eleventh Amendment rights. In *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), the Court emphasized that, in order to abolish a state's constitutional immunity, "Congress [must] unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." As the Court observed in *Atascadero*:

> A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.

473 U.S. at 246.

These authorities establish that the Eleventh Amendment would bar a refund remedy in this case. The discussion of the Eleventh Amendment in *McKesson* is not inconsistent with this conclusion. The *McKesson* Court addressed a very different question — the application of the Amendment in appeals from state court proceedings. The Court's decision that the Eleventh Amendment does not apply to appeals from actions originally brought in state courts is in accordance with the Amendment's language. The decision leaves no doubt about the continued application of the Eleventh Amendment to original suits in federal court. 496 U.S. at 28.

In short, if New Hampshire is unsuccessful in this litigation because of a problem with the credit against the business profits tax, Plaintiffs would be entitled to prospective relief only. Even if some form of retroactive relief were determined to be appropriate, the Eleventh Amendment would bar a refund remedy. And if some type of retroactive remedy is nonetheless

considered, New Hampshire should have the same flexibility to respond to the Court's determination that Florida had in *McKesson*. The recommendation in the Special Master's Final Report that New Hampshire be denied all of these rights should be rejected.

E. This Court Lacks Jurisdiction (Recommendation A)

The majority of this brief addresses the merits of this case and demonstrates that the New Hampshire Nuclear Property Tax system is valid and that the Special Master's conclusion to the contrary was in error. But all of the arguments have to do with a dispute between taxpayers — utilities owning interests in Seabrook — and the State of New Hampshire. Plaintiffs, the States of Connecticut, Massachusetts and Rhode Island are not Nuclear Property Tax payers and their citizens as consumers are not bearing a higher New Hampshire tax burden than consumers in New Hampshire. This important fact deprives the Court of jurisdiction because the original basis on which Plaintiffs sought leave to file the Complaint has now been shown to be erroneous.

Plaintiffs recognized that this Court could exercise original jurisdiction only if this case presented a controversy between two or more states. Because the Plaintiff States are not subject to the Nuclear Property Tax, they had no direct claim against New Hampshire to assert in this Court. Instead, they resorted to an indirect claim — a claim that they and their citizens, as consumers of electricity, were the victims of a discriminatory tax system under which they paid more of the burden of New Hampshire's Nuclear Property Tax than did consumers in New Hampshire. Thus, in their Brief in Support of their Motion For Leave To File The Complaint, Plaintiffs stated:

> In the present case, the tax has been imposed virtually entirely on utility companies which sell electricity at retail to out-of-state consumers, with the ultimate resulting burden falling on the consumers of the electricity generated — that is, on the Plaintiff States and their citizens.

Brief p. 22. Based on such representations, the Court granted leave to file the Complaint.

It is now clear from the record that the representations on which the Court granted leave to file the Complaint are were in error. Consumers in the Plaintiff States are not paying New Hampshire taxes at a higher rate than consumers in New Hampshire. Section V of the Stipulation reveals that PSNH, the New Hampshire Co-op and Granite State each charge consumers in New Hampshire the Nuclear Property Tax. Stipulation ¶¶ 5.14, 5.27. Section V indicates that most of the out-of-state utilities, but not CL&P, are also charging rates which include the Nuclear Property Tax. Stipulation ¶ 5.24.[24] Insofar as the Nuclear Property Tax is concerned, therefore, the Stipulation reveals that there is no discrimination against consumers in the Plaintiff States. If they are served by a joint owner of Seabrook, like consumers in New Hampshire are, they pay or will pay the Nuclear Property Tax in the rates charged for electricity.

With respect to the business profits tax, there is also no evidence of discrimination against consumers in the Plaintiff States. The theory of Plaintiffs' Complaint and Brief in Support of the Motion for Leave to File was that the New Hampshire utilities had or would have larger business profits tax liabilities than the out-of-state owners. In turn, the Plaintiffs alleged that

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[24] UI will only begin including the Nuclear Property Tax in rates on January 19, 1993. Stipulation ¶ 5.23.

New Hampshire utilities would avoid the Business Profits Tax by use of the Nuclear Property Tax credit, thus lightening the tax burden that would otherwise be borne by New Hampshire consumers. The evidence, however, indicates that the New Hampshire utilities owning interests in Seabrook and selling to retail consumers had no business profits tax liability to avoid and that New Hampshire consumers' rates are not being reduced as a result of the Nuclear Property Tax credit. Stipulation ¶ 17.1.

In contrast, the out-of-state utilities selling to consumers in their states did have business profits tax liabilities in the past. Stipulation ¶ 17.1. For the first year in which the New Hampshire tax system was in place, Section VII of the stipulation reveals that the out-of-state utilities were able to use the Nuclear Property Tax credit to reduce the business profits taxes they would otherwise have paid to New Hampshire. Section V of the Stipulation reveals that these tax savings were passed on to consumers in those states. No business profits taxes are included in the rates charged to those consumers because the out-of-state owners of Seabrook expect their liability for business profits taxes to be offset by the Nuclear Property Tax credit. Stipulation ¶¶ 5.6, 5.15, 5.23, 5.24.

Thus, not only is there no discrimination in favor of New Hampshire consumers, but the evidence in the record indicates that out-of-state consumers are experiencing a reduction in the taxes they would otherwise have paid. While New Hampshire consumers paid all of the taxes paid by the New Hampshire utilities, they received no benefit from the credit. Contrary to the indications in support of the Motion for Leave to File the Complaint, there is no basis for a controversy between the Plaintiff States and New Hampshire grounded on disparities in rates charged to consumers of electricity.

But the evidence that no controversy between the states exists is even stronger. The record reveals that New Hampshire

consumers actually incur *higher* New Hampshire tax costs in their rates than do consumers in the Plaintiff States as a result of the inclusion of hypothetical business profits taxes in their rates. Exhibits 10 and 11 to the Document Stipulation establish that the rates charged to retail customers of Granite State have been increased to account for business profits taxes that are not actually paid to New Hampshire. Exhibits 13 and 14 indicate that Northeast Utilities has requested that rates charged to retail customers of PSNH include business profits tax that has not been paid to New Hampshire. The New Hampshire Public Utilities Commission has not yet acted on Northeast Utilities' request.

This evidence, coupled with the facts in Sections V and VII of the Stipulation, was not before the Court when it granted leave to file the Complaint. All of these changed circumstances were described to the Special Master, who did not disagree that they had occurred. In fact, he found that, contrary to the Plaintiff States' original assertions, customers in New Hampshire have borne as much of the burden of the Seabrook Tax as those in Plaintiff States. Final Report at 16. Nonetheless, he dismissed this change in circumstances as an argument on the merits, rather than as a critical fact bearing on the Court's jurisdiction. Final Report at 16. The Special Master's only explanation of the States' interest, given the absence of any discrimination against their consumers, is that, if the utilities prevail in having New Hampshire's tax declared unconstitutional, consumers in the Plaintiff States will benefit. But this benefit, which would also be enjoyed by consumers in New Hampshire, cannot turn this case into a controversy between the states. If it could, any challenge that a utility makes to a tax — or any other fee, license or expense — levied by another state would fall within this Court's original jurisdiction.

New Hampshire submits that the Special Master's conclusion that these changed circumstances have no jurisdictional significance is in error. Had this Court been advised that consumers

in the Plaintiff States pay no higher rates as a result of New Hampshire's tax system than consumers in New Hampshire, it undoubtedly would have considered this fact important when assessing the Court's jurisdiction. Had the Court been advised that at least some New Hampshire citizens actually pay higher New Hampshire tax costs than consumers in the Plaintiff States, it clearly would have had a different view on the question whether the Plaintiff States had cause for complaint. Had the Court been advised that the only Seabrook owners who have benefitted from the credit against the Business Profits Tax are the utilities engaged in interstate sales, rather than intrastate sales, of electricity, assessment of the jurisdictional question could well have been affected. Now that these facts are available, the Court should reconsider the question and should conclude that this case is not a controversy between two or more states over which the Court has original jurisdiction. *See Wyoming v. Oklahoma*, 60 U.S.L.W. 4119, 4122 (1992) (Indicating that a "change in circumstances, whether of fact or law" can call for reconsideration of the decision to grant leave to file an original action.)

H. Conclusion

For the foregoing reasons, the Special Master's Recommendations A through D should be rejected; the Complaints of Plaintiffs, the Intervening Utilities and the amici curiae challenging the Nuclear Property Tax should be dismissed and judgment should be entered in favor of New Hampshire.

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